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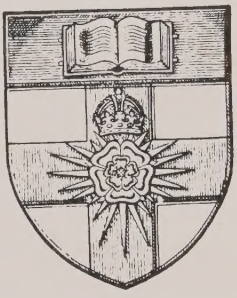

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

XLVII VICTORIÆ.

[IN THE COURT OF APPEAL.]

1883
Nov. 9.

THE CORPORATION OF PETERBOROUGH, APPELLANTS; THE OVERSEERS OF THE PARISH OF WILSTHORPE AND THE ASSESSMENT COMMITTEE OF THE STAMFORD UNION, RESPONDENTS.

*Practice—Appeal—Case stated pursuant to Agreement and by Judge's Order—Poor Rate Appeal—*12 *&* 13 *Vict. c.* 45, *s.* 11*—Supreme Court of Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 19.

An appeal will lie to the Court of Appeal from the decision of the Queen's Bench Division upon a case stated under 12 & 13 Vict. c. 45, s. 11, in an appeal against a poor-rate; for the decision of the Queen's Bench Division is an "order" within the meaning of the Supreme Court of Judicature Act, 1873, s. 19.

APPEAL against a rate made on the 23rd of December, 1880, for the relief of the poor of the parish of Wilsthorpe, whereby the corporation of Peterborough were rated for "the pumping station of Peterborough Waterworks and pipes," in that parish,

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on the assessed sum of 864*l.* gross estimated rental, and 720*l.* nett rateable value.

Notice of appeal to the court of quarter sessions for the parts of Kesteven, in the county of Lincoln, having been duly given (after failure to obtain relief by objection made to the assessment committee), it was agreed between the parties to the appeal that, pursuant to the provisions of 12 & 13 Vict. c. 45, s. 11, the facts of the case should be stated in the form of a special case for the opinion of the High Court of Justice (Queen's Bench Division), and in pursuance of such agreement an order, dated the 22nd of December, 1882, was made by Day, J., and the facts were stated accordingly. Judgment in conformity with the decision of the High Court was to be entered by the court of quarter sessions.

Upon the argument of the special case before the Queen's Bench Division (Williams and A. L. Smith, JJ.), it was adjudged that the works of the corporation in the parish of Wilsthorpe were liable to be rated, but that the principle on which they had been rated was not correct, and that the proper mode of assessment was by entering the rateable value as nothing. Leave to appeal was given.

The overseers of the parish of Wilsthorpe and the assessment committee of the Stamford Union appealed against so much of the judgment of the Queen's Bench Division as declared that the principle upon which the works of the corporation had been rated was not correct, and that the proper mode of assessment was by entering the rateable value as nothing.

Crump, for the corporation of Peterborough. There is a preliminary objection to the hearing of this case. It is not an appeal against any order, rule, or decision of the Queen's Bench Division: no judgment has been entered in that court; the parties have agreed to take the opinion of the High Court of Justice pursuant to 12 & 13 Vict. c. 45, s. 11; but no judgment has as yet been given, and when it has been given, it is to be entered in the court of quarter sessions, and not elsewhere: *Corporation of Peterborough* v. *Overseers of Thurlby*. (1) It is not

(1) 8 Q. B. D. 586.

the same as if the justices in quarter sessions had made an order. The present case is very distinguishable from *Overseers of Walsall* v. *London and North Western Ry. Co.* (1) In that case a rule of the Queen's Bench Division had been discharged, and it was held that a "rule" is by the Supreme Court of Judicature Act, 1873, s. 100, included in the word "order," and therefore that an appeal lay under s. 19. In the present case the Queen's Bench Division have pronounced only an opinion.

F. Marshall, contrà, was not called upon to argue.

BRETT, M.R. I have no doubt about this point. The agreement to state a special case was entered into pursuant to powers conferred by the legislature; and the order of the judge is an order made under the authority of a statute. The question is put to the Queen's Bench Division pursuant to the statute in order that the point may be decided so as to bind the parties: that is an adjudication or order. The Supreme Court of Judicature Act, 1873, s. 19, enacts that an appeal shall lie from every "order," and therefore an appeal lies in the present case.

BOWEN, L.J., concurred.

The appeal was then heard upon the merits, but it was ultimately dismissed on the ground that the question at issue between the parties was concluded by authority.

Solicitor for Corporation of Peterborough: *W. D. Gaches.*

Solicitors for Overseers of Wilsthorpe and Assessment Committee: *Joseph Mote & Son, for R. M. English, Stamford.*

(1) 4 App. Cas. 30.

J. E. H.

1883
Nov. 10.

[IN THE COURT OF APPEAL.]

THWAITES *v.* WILDING AND HANCOCK.

Landlord and Tenant—Lodger—Lodgers' Goods Protection Act, 1871 (34 & 35 *Vict. c.* 79), *s.* 1—*Declaration by Lodger inoperative against subsequent Distress—Illegal Distress—Voluntary Abandonment.*

A declaration under the Lodgers' Goods Protection Act, s. 1, will not protect a lodger's goods against seizure and sale by a superior landlord for rent due from his immediate tenant, unless it has been made after the distress has been levied or authorized or threatened: a declaration is inoperative against a distress subsequently levied, which has not been authorized or threatened before the declaration is made.

The plaintiff was a lodger in one of three rooms let to T. who was the immediate tenant of the defendant. Rent to the amount of 8*l.* being due from T. to the defendant, the defendant distrained the goods in the rooms including the plaintiff's. She thereupon made a declaration under the Lodgers' Goods Protection Act, s. 1, which was correct in all respects. T. and the defendant came to an arrangement whereby 1*l.* was to be paid down, and the remaining 7*l.* by instalments; and the distress was thereupon withdrawn by the defendant. None of the agreed instalments having been paid by T., and a further sum of 1*l.* having accrued due for rent, the defendant afterwards levied a second distress for the sum of 8*l.*, under which the plaintiff's goods were again seized and sold. She made no further declaration under the Lodgers' Goods Protection Act, but she owed no rent to T.:—

Held, that no action of trespass would lie against the defendant for distraining the plaintiff's goods; for the declaration made at the time of levying the first distress was ineffectual against the second, and the first distress had not been voluntarily abandoned.

APPEAL by the plaintiff from a decision of Denman and Manisty, JJ., setting aside the verdict and entering judgment for the defendants.

The facts of the case are fully stated in the report of the proceedings before the Queen's Bench Division (1), and may be gathered from the above head-note.

M'Clymont, and *Shearman*, for the plaintiff. In the present case the lodger, the plaintiff, had made a declaration which was correct in all respects; surely this was sufficient to defeat a distress levied only little more than a fortnight afterwards. If

(1) 11 Q. B. D. 421.

notice that the goods are the lodger's is once brought home to the superior landlord, he afterwards seizes at his peril. A lodger is not bound to make a fresh declaration every time that the superior landlord distrains. The preparation of the inventory is attended with expense; is it reasonable that this expense should be incurred a second time?

Moreover, the second distress was illegal at common law, because the first had been voluntarily abandoned: *Dawson* v. *Cropp* (1).

Henry Kisch, for the defendants. The plaintiff as lodger cannot maintain an action for trespass in breaking and entering her room; she was only a lodger, and the possession of the room was in Stephen Thwaites. [He was then stopped.]

M'Clymont, in reply.

BRETT, M.R. Two points have been raised upon the argument before us: one is important and depends on the Lodgers' Goods Protection Act (34 & 35 Vict. c. 79). The landlord had an immediate tenant, who had as lodger the plaintiff. On the 1st of September, 1882, 8*l.* was due from the immediate tenant to the landlord, who distrained the goods in the demised rooms; the plaintiff then made a declaration under s. 1 of that statute, and added an inventory; it must be taken that that declaration and that inventory were true. The plaintiff, as lodger, did everything necessary under the Act. It thereupon became the duty of the landlord to withdraw from possession of the plaintiff's goods, and he withdrew in sufficient time. It is admitted that he withdrew the distress altogether, and upon referring to the report of the proceedings before the Queen's Bench Division, I think that there cannot be any dispute as to the mode and manner of withdrawing the distress. As the immediate tenant did owe 8*l.*, he offered to the defendant to pay 1*l.* and the rest by weekly instalments of 10*s.* I cannot doubt that the immediate tenant did pay the sum of 1*l.*, and that thereupon the distress was withdrawn. The immediate tenant did not pay the 10*s.* a week; further rent accrued and another 1*l.* became due. Another sum of 8*l.* was owing, and it was made up of the unpaid balance of

(1) 1 C. B. 961.

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7*l.* and of 1*l.* for subsequent rent. The defendant entered on the 21st of September, for this new sum of 8*l.*, and seized the same goods of the lodger, the plaintiff, at a time when no rent was due from her to Stephen Thwaites, her immediate landlord. She made no new declaration, and she gave no new notice, and yet she brings this action against the superior landlord. She brings this action, because she thinks herself protected by the statute, and she also contends that the landlord is liable at common law, because the defendant could not distrain upon her immediate landlord, and that she can maintain trespass. This point is quite distinct from the other question.

The first question is whether the declaration and the inventory of the 5th of September, protect the plaintiff's goods under the Lodgers' Goods Protection Act. For the purpose of disposing of this point, I will assume that the second seizure was legal at common law, and I will consider whether the declaration and the inventory do protect a lodger's goods against a second and subsequent seizure, which is legal at common law. In the present case the declaration of September 5th was made before the seizure of September 21st; has it been issued in the manner described in the statute? the plaintiff can be protected only if the declaration is made under the terms of the statute, that is, after the distress has been levied, or at all events authorized or threatened, and if the declaration is made before any one of these events has occurred, it is not within the statute; and even if the rent is the same, and even if the goods are the same, and even if the owner is the same, the lodger is not protected, unless he makes a new declaration; it is not sufficient to rely upon a previous declaration; the words of the statute are imperative. It is said that the construction in favour of the defendants will render the statute ineffectual to protect lodgers. I do not think so; the legislature has imposed conditions, and those conditions must be rigidly complied with in order to deprive the landlord of his remedy at common law, and to bring the lodger within the protection of the statute.

The second point is whether the plaintiff can sue for an illegal distress. I will not say whether this action would be maintainable, if this were simply a case of excessive distress; but it seems to me that this second distress was quite legal as against the

plaintiff. No doubt an action would have lain if the distress had been for the same rent after a voluntary abandonment, but in the present case the first distress was withdrawn at the request of the immediate tenant: it was not a voluntary withdrawal by the defendant Wilding, the superior landlord, but it was a withdrawal under an arrangement. The present facts do not fall within the doctrine applicable to cases of voluntary abandonment. The immediate tenant did not comply with the terms of the arrangement, and therefore the defendant Wilding had a right to distrain a second time; as superior landlord, he exercised the right conferred upon him by the common law. The judgment of the Queen's Bench Division must be affirmed.

BOWEN, L.J. I think it clear that a lodger is relieved only when the terms of the Lodgers' Goods Protection Act have been rigidly complied with. A lodger must make a fresh declaration each time that a distress is levied on his goods. A declaration made at the time of levying one distress will not protect him against a second and subsequent distress. The statute is not for the benefit of the lodger alone; the superior landlord is to enjoy a correlative benefit, he is to receive in part discharge of his claim payment of any rent which may be due from the lodger to his immediate landlord. The declaration required from the lodger must state that the goods seized are his, and whether any and what rent is due from him. The property in the goods seized may vary from time to time, and the state of account between the lodger and his immediate landlord may vary in like manner. It was intended that the existing rights of the parties should be ascertained at the moment when the distress is levied; I think that that is very plain upon the language of the statute. If subsequently accruing rent is distrained for, a former declaration may not fit the existing state of things, it may not truly represent them; a declaration has reference only to the time when it is actually made. I agree with the Master of the Rolls that when a fresh distress is levied it must be met by a fresh declaration.

But it has been further contended that the defendant Wilding had no right of distress. When rent is in arrear, a landlord may

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sue by action, or he may enter upon the demised hereditaments and seize the goods and chattels to be found thereon. If rent is payable by instalments, a landlord may distrain for an unpaid instalment, but he must not split his demand; he must not distrain from week to week for different parts of one entire sum due as rent, and when he has levied a distress he must not voluntarily withdraw it and abandon it. I think that is established by *Dawson* v. *Cropp* (1) and *Bagge* v. *Mawby*. (2) But here there was no voluntary abandonment of the first distress. The defendant Wilding withdrew pursuant to an arrangement with his immediate tenant, who failed to observe it.

Appeal dismissed.

Solicitors for plaintiff: *Weald & Barker.*
Solicitor for defendants: *G. A. Haynes.*

J. E. H

Nov. 19.

BOOTH *v.* TRAIL AND OTHERS.
CORPORATION OF SUNDERLAND, GARNISHEES.

Practice—Attachment of Debts—Police Constable's Superannuation Allowance—Order XLV., *r.* 1—"*Debt owing or accruing*"—*Wages Attachment Abolition Act*, 1870 (33 *&* 34 *Vict. c.* 30).

A sum already accrued due to a retired police constable in respect of his superannuation allowance under 11 & 12 Vict. c. 14, may be attached in execution.

Semble, the Wages Attachment Abolition Act, 1870, only applies to inferior Courts of record and not to the High Court of Justice.

APPLICATION for attachment of debt under Order XLV., r. 1.

It appeared that one of the defendants, against whom judgment had been recovered, had been a police constable in the employment of the corporation of Sunderland, and upon his retirement had been awarded an annual pension or superannuation allowance under 11 & 12 Vict. c. 14. A sum of 10*l.*, being one quarter's pension, had prior to the application accrued due to him from the corporation in respect of such pension and remained unpaid. The application was that the garnishees might be ordered to

(1) 1 C. B. 961. (2) 8 Ex. 641.

pay to the judgment creditor the amount already due and all amounts to become due in respect of the pension as they fell due from time to time until the judgment debt was satisfied. The application had been referred by a judge at chambers to the Court.

Chitty, for the judgment creditor. The retiring pension of a police constable is not within the Wages Attachment Abolition Act, 1870. It cannot be said to be "wages of a servant, labourer, or workman," see *Gordon* v. *Jennings*. (1) Moreover that Act does not appear to have been intended to apply to the superior Courts, but only to inferior Courts of record such as those mentioned in the preamble.

It must be admitted that the case of *Webb* v. *Stenton* (2) is a distinct authority to shew that the application cannot be supported so far as it concerns payments in respect of the pension to become due in the future, but it is submitted that the amount already accrued due is attachable as a debt. Any sum of money which the garnishee is compellable in præsenti to pay to the judgment debtor is a debt for this purpose. It is not necessary that it should be recoverable by action: *Dent* v. *Dent* (3); *Wilcock* v. *Terrell* (4); *Sansom* v. *Sansom*. (5) The cases relating to pensions granted by the East India Company to officers are distinguishable, for there the pensions were mere gratuities and not legally recoverable: *Gibson* v. *East India Company* (6); *Innes* v. *East India Company*. (7)

Julian Robins, for the garnishees, shewed cause. This case falls within the Wages Attachment Abolition Act, 1870.

[STEPHEN, J. To my mind that Act seems to have been intended to apply to inferior Courts of record and not to the High Court.]

The pension sought to be attached is not a debt within the meaning of the order relating to the attachment of debts: *Webb* v. *Stenton*. (2) The cases relating to sequestration, such as *Wilcock* v. *Terrell* (4), do not apply. Everything that comes

(1) 9 Q. B. D. 45.
(2) 11 Q. B. D. 518.
(3) Law Rep. 1 P. & D. 366.
(4) 3 Ex. D. 323.
(5) 4 P. D. 69.
(6) 5 Bing. N. C. 262.
(7) 17 C. B. 351.

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within the description of "property" is subject to sequestration. It is only a debt which can be attached.

Chitty, in reply. The case of *Webb* v. *Stenton* (1) undoubtedly decides that the payments in respect of an annuity to become due in future cannot be attached, because they are not debitum in præsenti, solvendum in futuro. It is uncertain whether they ever will become due. But the reasoning upon which the judgment rests rather implies that payments already accrued due in respect of such annuity may be attached.

[He cited *Tapp* v. *Jones*. (2)]

LORD COLERIDGE, C.J. I am of opinion that the judgment creditor is entitled to an order attaching so much of the pension as had already accrued due at the date of the summons. We are, however, bound by the decision of the Court of Appeal in *Webb* v. *Stenton* (1), and independently of that decision it seems to me clear that sums which may or may not become due in the future are not debts owing or accruing within the meaning of the rules relating to attachment of debts. Therefore, so much of the application as seeks to attach the pension prospectively as it falls due from time to time must be refused. It seems to be implied in the judgments in *Webb* v. *Stenton* (1) that an order may be made attaching the payment already due. A sum in the hands of the garnishees, which they in some way or other can presently be compelled to pay to the judgment debtor, seems to me to be a debt within the rule, and therefore attachable. It appears to me to be none the less a debt because no particular mode of enforcing the payment is given by the statute. When there is a statutory obligation to pay money, and no other remedy is expressly given, there would be a remedy by action. It is clear that, there being a statutory obligation and the corporation having the funds to meet it, the corporation could in some way or other be compelled to pay, and it appears to me, therefore, that within the meaning of the rule there is a debt due to the judgment debtor in respect of the amount already accrued due. Consequently the order will be to attach so much as was due at the time when the summons was taken out.

(1) 11 Q. B. D. 518. (2) Law Rep. 10 Q. B. 591.

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STEPHEN, J. I agree. I will only add a few words with regard to the distinction between this case and *Gibson* v. *East India Co.* (1) The decision in that case turned entirely, as it seems to me, on the peculiar character and position of the East India Company. It was decided on the ground that, having regard to that character and position, the Company could not be considered as having made any legally binding contract with the bankrupt in respect to his pension. The present case is altogether different. Here there was a statutory obligation on the corporation. It seems to me that a sum which the corporation is presently bound to pay to the judgment debtor is a debt due within the rule.

Order accordingly.

Solicitors for judgment creditor: *Botterell & Roche, for Alcock.*
Solicitors for garnishees: *Brownlow & Howe, for Kitson.*

E. L.

SHELLEY, APPELLANT; BETHELL, RESPONDENT.

Nov. 23.

Theatre—Having or keeping a House for the Public Performance of Stage Plays —6 & 7 Vict. c. 68, *s.* 2.

The appellant was the owner and occupier of a building which he gratuitously allowed to be used on a few occasions for the performance of stage plays, to which the public were admitted on payment, for the benefit of a charity. The appellant had no licence for the performance of stage plays in such building:—

Held, that he was rightly convicted, of having or keeping a house for the public performance of stage plays without a licence, under 6 & 7 Vict. c. 68, s. 2.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43, the facts of which were substantially as follows:—

Informations had been preferred by the respondent against the appellant for that on the 13th, 15th, and 16th days of December, 1882, the appellant being the occupier and keeper of a certain house of public resort called the Shelley Theatre, did have and keep open the said house for the public performance of stage plays therein without authority or licence as required by law, contrary to s. 2 of 6 & 7 Vict. c. 68.

(1) 5 Bing. N. C. 262.

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At the hearing of the informations it appeared that the appellant was the owner and occupier of a building the interior of which was fitted up as an ordinary theatre, with a stage, stage scenery, machinery, footlights, and other usual adjuncts of a theatre, except that there was no box office or other place in the theatre for the sale of tickets or receipt of money for admission. The part of the theatre for spectators contained seats for two or three hundred persons. Advertisements were inserted in certain newspapers in December, 1882, stating that a performance of a play called 'The Cousins,' would take place at the appellant's theatre under the personal superintendence of Mr. Hamilton Aidé, the author of such play, in aid of the funds of the School of Dramatic Art, and that tickets for admission, price 1*l.* 1*s.*, were to be procured of the Secretary, School of Dramatic Art, 7, Argyll Street, Regent Street.

It was proved that these advertisements were inserted by the order of the secretary of the School of Dramatic Art, under the direction of Mr. Hamilton Aidé, the author of the play, which was performed in the theatre as advertised under his personal superintendence. Over 300 tickets were sold by the said secretary for the performances at 1*l.* 1*s.* a ticket. The appellant personally gave the said secretary no instructions as to the sale of tickets, but was usually present at the performances, and gave directions occasionally as to the placing of spectators' seats. Tickets of admission were not sold within or outside the theatre.

Performances took place in accordance with the advertisement on three occasions, viz., 13th, 15th, and 16th of December, 1882. The appellant painted part of the scenery used at the performance, and witnessed the performance. All the scenery used was his, and his servants opened the theatre doors, shifted the scenes, and closed the building after the performances. Large audiences were present on each occasion. The appellant never parted with the possession of the theatre, but only allowed Mr. Aidé and those interested in the School of Dramatic Art to use the same for the purpose referred to. It was not alleged that the appellant had been paid or received any money or other reward on account of or for the use of the said theatre. It was admitted that the balance of the moneys received by the said

secretary, after payment of the expenses incurred in connection with the performances, was paid or applied by him to the funds of the said School of Dramatic Art.

It was admitted that 'The Cousins' was a stage play within the meaning of 6 & 7 Vict. c. 68, and that the said theatre was not a patent theatre, nor had the appellant a licence for the public performance of stage plays therein.

The magistrate was of opinion on the evidence that the appellant had contravened the provisions of 6 & 7 Vict. c. 68, s. 2, and therefore convicted him in a penalty of 1*s.* and costs on each of the informations.

The question for the Court was whether he was right in so convicting.

Willis Bund, for the appellant. The appellant has not kept a house for the public performance of stage plays within the meaning of the 2nd section of 6 & 7 Vict. c. 68. The theatre was a private theatre, so far as the habitual use of it was concerned, but on these three occasions the owner allowed the use of it gratuitously to the School of Dramatic Art, for a charitable purpose, viz., a performance in aid of their funds. He cannot in any reasonable sense of the words be said to keep open a house for the public performance of stage plays. The section contemplates an habitual keeping for public performances. The word "keep" has in other cases been held to point to an habitual, not a mere occasional use: *The Queen* v *Strugnell* (1).

[LORD COLERIDGE, C.J. The point on which that case turned was that the appellants were not the persons in permanent control of the room. Here the appellant is admitted not to have parted with possession of the building. The words are "have or keep."]

Those words are merely synonymous.

[MATHEW, J. The section inflicts a penalty for one day's having or keeping the house for the public performance of stage plays.]

It is submitted that it is a straining of language to say that a person who allows his building to be used in an occasional

(1) Law Rep. 1 Q. B. 93.

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manner on one day for the public performance of a stage play has or keeps a house or place of public resort for the performance of stage plays even for one day.

Poland (*Bernard Coleridge* with him), for the respondent, was not called upon.

LORD COLERIDGE, C.J. It seems to me reasonably clear that the appellant was rightly convicted, and that, although his intentions were doubtless good, he has committed an offence against the law. The 2nd section of 6 & 7 Vict. c. 68, enacts that it shall not be lawful for any person to have or keep any house or other place of public resort in Great Britain, for the public performance of stage plays without authority by virtue of letters patent from Her Majesty, or without licence from the Lord Chamberlain, or from justices as thereinafter provided.

The appellant was the owner and occupier of a building which was constructed and fitted so as to be useful for nothing but the purposes of a theatre, and which was in fact used as a theatre on the occasions in question: for charitable objects no doubt he allowed stage plays to be performed in this building; advertisements were previously issued; tickets were sold; considerable numbers of spectators were brought together; and, as it appears to me, all the ordinary incidents of a public performance for money of a stage play occurred with reference to this building.

I think it would be frittering away the language of the enactment to encourage a doubt but that what the appellant did in this case cannot be done without the authority of letters patent or a licence as required by the statute. It appears to me very important that the necessity for a licence in such cases should be maintained. It is obvious that the collection together of considerable numbers of spectators at a play in a building of this sort involves the possibility of various evils, as for instance, danger from fire, against which it was the object of the legislature in requiring the licence to provide. Therefore, if a building used as this was on the occasions in question were beyond the jurisdiction of the Lord Chamberlain, the public objects for which that jurisdiction exists might be to a considerable extent defeated. I do not think it is clear that the words "have" or

"keep" as used in the section are intended to be merely synonymous; but in any case, as my brother Mathew has pointed out, one day only of such performances as are mentioned in the section entails the penalty thereby imposed. It is clear from this that there need not have been an habitual use of the building for such performances to bring the case within the section.

MATHEW, J. I am of the same opinion. It was argued for the appellant in effect that a private theatre kept open occasionally for public performances was not within the section. The earlier part of the section states what it shall not be lawful to do, viz., to have or keep any house or other place of public resort for the public performance of stage plays without authority by letters patent or without licence. The section then proceeds to impose a penalty not exceeding 20*l.* "for every day on which such house or place shall have been so kept open for the purpose aforesaid without legal authority." What is the purpose aforesaid? It is the public performance of stage plays. So the keeping of a house open for one day for the public performance of stage plays is an offence within the section. It seems to me that what the appellant did was clearly within the section and that the conviction should therefore be affirmed.

Conviction affirmed.

Solicitor for appellant: *C. E. Withall.*
Solicitors for respondent: *C. & S. Harrison & Co.*

E. L.

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Nov. 23.

HOWITT *v.* THE NOTTINGHAM AND DISTRICT TRAMWAYS COMPANY, LIMITED.

Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 29, 55—*Liability for Non-repair of Road—Contract with Road Authority—Transfer of Liability.*

Where a tramway company enters into a contract with the road authority under 33 & 34 Vict. c. 78, s. 29, whereby the road authority undertakes the repair of the portion of the road upon which the tramway is laid, the liability for damage occasioned by the non-repair of that part of the road, which would but for such contract be cast by s. 28 upon the tramway company, is transferred to the road authority.

Appeal from the decision of the County Court of Nottinghamshire.

The action was to recover damages for injury alleged to have been done to the plaintiff's carriage by reason of the defendants' tram line, and the adjoining portion of the street in Nottingham where the same was laid, not being maintained and kept in good and proper condition and repair.

It was proved that the defendants had entered into a contract with the corporation of Nottingham, the road authority, under s. 29 of 33 & 34 Vict. c. 78, whereby the corporation undertook, for an annual sum paid by the company, to maintain and repair that part of the road whereon the tramway was laid as required in s. 28 of the said Act.

It appeared that at the spot where the accident happened the stones of the roadway by the side of the defendants' line had become depressed, so that the line stood up above the roadway, and the accident was caused by the wheel of the carriage catching in the line.

The special Act confirming the provisional order, under which the defendants' tramway was made, was 40 & 41 Vict. c. cxxiv. It incorporated 33 & 34 Vict. c. 78, but it is deemed unnecessary to set out its provisions as the Court decided the case upon the enactments of the general Act.

The county court judge nonsuited the plaintiff, on the ground that the effect of the contract made by defendants with the corporation was to transfer to the latter the liability of the defendants

to keep the street and tramway in a proper state of repair, and to free the defendants from such liability. A rule nisi had been obtained for a new trial or to enter judgment for the plaintiff on the ground that the judge's ruling was wrong. (1)

Wills, Q.C., and *Weightman*, for the defendants, shewed cause. The tramway company are under s. 28 of the Tramways Act, 1870, liable to repair the part of the road on which their tramway is laid, but the only reasonable construction of s. 29, is that, where the road authority contract with the tramway company to repair, the liability, which by s. 28 is primarily cast on the latter, is transferred to the road authority. It is impossible to suppose that the tramway company are to be liable when they have no power to do the repairs, and it is clear that, when the arrangement contemplated by s. 29 is made, the whole control of the road is to be handed over to the road authority.

It is obvious that, where the tramway company is responsible for the repair of part of the road, and the road authority for the repair of the other part, troublesome questions as to the limits of their respective responsibilities and as to which is responsible for any particular default or damage would be continually arising. The tramway portion of the road could hardly get out of order in many cases without involving the other part of the road. And there would be constant questions as to which was to blame, and in some cases the road authority might be rendered in default by reason of the tramway company's neglect. Therefore it seems to have been contemplated by s. 29, that for the protection of the road authority arrangements might be made whereby they should by contract with the tramway company undertake the sole control over and responsibility for the whole of the road.

Richard T. Wright, for the plaintiff, supported the rule. The 28th and 55th sections of 33 & 34 Vict. c. 78, clearly impose the

(1) Sect. 29 of 33 & 34 Vict. c. 78, enacts as follows: "The road authority on the one hand and the promoters on the other hand, may from time to time enter into and carry into effect .... contracts, agreements, or arrangements with respect to the paving and keeping in repair of the whole or any portion of the roadway of any road on which the promoters shall lay any tramway and the proportion to be paid by either of them of the expense of such paving and keeping in repair."

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liability to repair the road on the defendants. It is a general principle of law that a person upon whom a liability is imposed, whether at common law or by statute, cannot absolve himself from such liability by delegating his duty to a sub-contractor. See observations of Lord Blackburn in *Dalton* v. *Angus* (1): *Hole v. Sittingbourne Ry. Co.* (2)

[LORD COLERIDGE, C.J. Unless a statute expressly or by necessary implication enables him to do so.]

There is nothing in the terms of s. 29 expressly or by necessary implication importing such transfer of liability in the present case. All that the section imports is the undertaking of the liability by the road authority as between itself and the tramway company. It is consistent with the language of the section, that as between the tramway company and the public the liability of the former remains, the liability only being transferred as between the tramway company and the road authority.

[MATHEW, J. That contention appears to amount to this: the plaintiff can recover from the defendants, but the defendants can recover again from the road authority under the contract. Why should it be supposed that the legislature intended to preserve the liability to an action of the tramway company if the road authority are the parties ultimately and in substance responsible for these damages?]

The party injured may not be able to ascertain whether there is a contract transferring the liability to the road authority.

Wills, Q.C., in reply, was not called upon.

LORD COLERIDGE, C.J. I could have wished that the provisions of the enactments relating to this matter had been a little clearer, but on the best consideration I can give to them I come on the whole to the conclusion that the corporation is liable for the damage done to the plaintiff's carriage, and that the defendants are not. The matter seems to me to depend on the true construction of three sections of the general Act incorporated with the defendants' special Act. There is no doubt that in the first instance, both under the general and the special Acts, the liability to keep the portion of the road on which the

(1) 6 App. Cas. 740, at p. 829. (2) 6 H. & N. 488.

tramway is laid in repair is cast upon the promoters, but the road authority is treated as so far interested that such repair is to be performed subject to their control, and with such materials and in such manner as they approve, and supposing that it is not performed they may, after seven days' notice, do the works themselves. I quite agree that the effect of the 28th section is to cast the duty primarily on the promoters. Then comes the 29th section, which has to be read in connection with s. 28 as forming part of one enactment. That section provides that the road authority and the promoters may from time to time enter into and carry into effect contracts, agreements, or arrangements with respect to the paving or keeping in repair of the whole or any portion of the roadway of any road on which the promoters shall lay any tramway, and the proportion to be paid by either of them of the expense of such paving and keeping in repair. There is thus a parliamentary power given to the road authority to undertake the duty primarily cast upon the promoters. They have in this case undertaken and they have failed to perform such duty, and it seems to me to follow that a person injured by their failure to perform it may maintain an action against them. Now is the effect of these two sections altered by the 55th section? It appears to me that that section is not altogether happily expressed, but to the best of my judgment it does not affect the construction I have put on the 28th and 29th sections. It lays down in general terms that "the promoters shall be answerable for all accidents, damages, and injuries happening through their act or default, or through the act or default of any person in their employment by reason or in consequence of any of their works or carriages." If the section had stopped there it would, as it seems to me, have been impossible to contend, where there was a contract authorized by the Act whereby some persons other than the promoters undertook to do certain things and perform certain duties, and, in consequence of the failure of those persons to do those things and perform those duties, damage had resulted, that such damage would be damage happening through the act or default of the promoters or of some person in their employment. The very distinction between a servant and a contractor is that a contractor is not in the

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employment of the person with whom he contracts. Then comes the latter portion of the section, which says that "the promoters shall save harmless all road and other authorities, &c., from all damages and costs in respect of such accidents, damages, and injuries." I must own that it is not very easy to see to what cases these words are meant to be applied. Certainly they cannot be applied to cases where the road authority has itself done a damage through its own act or default. It cannot have been intended to enable the road authority to recover damages from the promoters in respect of acts which are acts of the road authority itself or its servants, and are not the acts of the promoters or acts over which they have any control. Possibly the words may have been intended to refer to matters in respect of which the road authority might be by law primarily liable, though as between themselves and the promoters the liability might by the provisions of the special Act or by contract rest upon the promoters, and it may have been the intention that in such cases, where the road authority might be liable to be proceeded against because the default was in a matter within their jurisdiction, yet, if by the terms of a contract or otherwise the promoters were as between themselves and such authority the party answerable, the promoters should indemnify the road authority. I do not think the sections of the special Act throw much light on the matter, for they do not seem to me substantially to alter the general enactments so far as they apply to this case. For these reasons I think the judgment of the county court judge must be affirmed.

MATHEW, J. I am of the same opinion. The 28th section of 33 & 34 Vict. c. 78, no doubt casts the obligation to keep the road in repair in the first instance on the promoters, and where the promoters fail to comply with the provisions of the section the proviso enacts that the road authority may open and break up the road and do the necessary repairs. Would it have been a reasonable contention that the legislature intended that, in a case where the road authority had availed themselves of the powers given by the proviso, the promoters should be responsible for their acts or defaults? Then how is s. 29 to be construed? Is it intended that, when by reason of a contract under that

section the road authority have taken on themselves the repairs of the road, the promoters are to be liable? I think the 29th section must be read as a further proviso on the 28th, and that, whereas the 28th section makes the promoters primarily liable, the 29th provides that they may make a contract with the road authority whereby the latter are to undertake the responsibility of the repairs. It seems to me that the true construction of the section is that the legislature contemplated that under such a contract the liability should be transferred to the road authority. Then is there any other section in the Act that makes against this construction? It is suggested that the 55th section does so, but it seems to me that that section only applies where there is no such contract or arrangement as is provided for in s. 29. With regard to the meaning of that section where it does apply, I agree with what my Lord has said on that subject.

Rule discharged.

Solicitors for plaintiff: *Dowson & Wright.*
Solicitors for defendants: *Wells & Hind.*

E. L.

THE SWANSEA CO-OPERATIVE BUILDING SOCIETY *v.* DAVIES. *Dec.* 4.

Practice—Action remitted for Trial to County Court under 19 & 20 *Vict. c.* 108, *s.* 26—*New Trial, Motion for—Order XXXIX., r.* 1—*Trial before Judge without Jury.*

In an action remitted for trial to a county court and tried by the county court judge without a jury, an application for a new trial must, under the Rules of the Supreme Court, 1883, be made to the Divisional Court.

APPLICATION for a new trial in an action remitted to a county court for trial under 19 & 20 Vict. c. 108, s. 26, and tried by the county court judge without a jury.

The county court judge having found a verdict for the plaintiffs—

Ashton Cross, for the defendant, moved for a new trial.

Cruikshanks, for the plaintiffs, objected that the application should have been to the Court of Appeal, the case being governed

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by Order XXXIX., rule 1. He contended that the decision in *Davis* v. *Godbehere* (1) did not apply, the language of the existing rule being different from that of the rule upon which that case was decided.

[He also cited *London* v. *Roffey*. (2)]

DAY, J. I am of opinion that we have jurisdiction to hear this motion, and that the objection raised by the plaintiffs must be overruled. I rest my decision on the authority of the judgment of the Court of Appeal in *Davis* v. *Godbehere* (1), which seems to me conclusive. That case was decided upon the old rules, but I cannot find any substantial difference in the language of the new rules on the subject.

A. L. SMITH, J. I agree. I was at one time disposed to think that this case was not governed by *Davis* v. *Godbehere* (1), but on consideration I think that that decision is in point. At first I thought that this was a cause where there had been a trial without a jury within Order XXXIX., rule 1, but it was pointed out that if that were so there would be no limitation of time for moving for a new trial, because the provisions of Order XXXIX., rule 4, clearly do not apply to trials in the county court. The decision in *Davis* v. *Godbehere* (2) is binding upon us unless the language of the new rules alters the practice as laid down by the old rules. The only alteration seems to be that in the new Order XXXIX., rule 1, the words "by a judge" are left out, and the words are only "without a jury," but it does not appear to me that that makes any substantial difference.

Objection overruled.

Solicitor for plaintiffs: *H. Thomas, for Leyson.*
Solicitor for defendant: *R. White, for Evans & Davis.*

(1) 4 Ex. D. 215. (2) 3 Q. B. D. 6.

E. L.

[CROWN CASE RESERVED.]

1883
Nov. 24.

THE QUEEN *v.* HOLMES.

Criminal Law, Venue—False Pretences, Place of Trial.

H. wrote and posted at N. in England a letter, addressed to G. at a place out of England, containing a false pretence by means of which he fraudulently induced G. to transmit to N. a draft for 150*l.* which he there cashed :—

Held by the Court (Lord Coleridge, C.J., Denman, Hawkins, Williams, and Mathew, JJ.), that there was jurisdiction to try H. at N., that the pretence was made at N., where also the money obtained by means of it was received.

CASE stated by Huddleston, B.

"The prisoner was tried and convicted before me at the Assizes at Nottingham, on Thursday, the 26th of July, 1883, for obtaining from Louis Gabet Gabet, 150*l.* by false pretences.

"The prisoner, who was a machine manufacturer at Nottingham, had entered into a contract at Caudry, in France, to build at Nottingham, for Gabet, a lace machine, to be completed within a certain time, to be paid for on certain terms, and to be sent to France to Gabet. The prisoner had written at Nottingham a letter containing the pretence which was proved to be false, and in consequence of which the prosecutor had parted with his money.

"The letter was written and posted at Nottingham, and received by the prosecutor Gabet, at Caudry, in France, from whence a draft for 150*l.* was sent according to, and in compliance with, the directions of the prisoner contained in his letter. The draft was received by the prisoner in Nottingham and cashed there.

"It was objected on the part of the prisoner that as the false pretence was made in England, but did not operate to obtain the money until it reached its destination in France, no offence was committed over which the English Court had jurisdiction.

"For the prosecution it was contended that as the representation was made in England and the money received there the offence was within the English jurisdiction.

"*Reg.* v. *Cooke* (1) was quoted.

"The only question for the Court is whether the prisoner could be indicted and tried for the offence in Nottingham. If he could the conviction is to stand; if not the conviction is to be quashed."

(1) 1 F. & F. 64.

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No counsel appeared.

LORD COLERIDGE, C.J. This conviction is perfectly proper. The charge was of fraudulently obtaining money by false pretences, and that charge was proved; but a question is reserved as to whether the place of trial was a correct place in which to try the prisoner. There is no doubt that it was correct; it appears, if authority be needed, from the case of *Rex* v. *Burdett* (1) that when a letter such as the one in question is posted the pretence is made, and here it appears the money is actually received and obtained as well as the letter posted in Nottingham. Of the two necessary ingredients of the offence both take place in Nottingham. It may be that one important part of the offence taking place in Nottingham would be sufficient, but here both ingredients take place at Nottingham.

DENMAN, J. I think the conviction should be affirmed, and I am disposed to think the case covered by *Reg.* v. *Cooke* (2). In that case it seem to have been held the man obtained the money in Northampton, where he wrote the letter, though it was paid over in Westminster, so that this would be an *à fortiori* case as compared with that.

HAWKINS, J. There is no doubt about this case, the conviction is right, every element occurred at Nottingham, whatever the prisoner did, he did there. If the conviction were quashed it would enable fraudulent people to carry on a profitable trade in false pretences with impunity.

WILLIAMS and MATHEW, JJ., concurred.

LORD COLERIDGE, C.J. I prefer not to rest my judgment upon *Reg.* v. *Cooke* (2), because perhaps that conviction may have proceeded on the 3rd count of the indictment. In saying this I do not intend to cast any doubt upon the case of *Reg.* v. *Cooke* (2), but my judgment is independent of that case.

Conviction affirmed.

C. D.

(1) 4 B. & A. 95.

(2) 1 F. & F. 64.

[CROWN CASE RESERVED.]

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Nov. 24.

THE QUEEN *v.* HOLLIS AND ANOTHER.

Larceny—Larceny by Trick—Criminal Law, ringing the Changes.

The two prisoners by a series of tricks fraudulently induced a barmaid to pay over money of her master to them, without having received from them in return the proper change, the barmaid had no authority to pay over money without receiving the proper change, and had no intention of or knowledge that she was so doing:—

Held by the Court (Lord Coleridge, C.J., Denman, Hawkins, Williams, and Mathew, JJ.), that the prisoners were properly convicted of larceny.

THIS was a case stated by the chairman of the Worcestershire Quarter Sessions.

"At the last quarter sessions Thomas Hollis was tried on a charge of larceny of money, the property of Charles Parkes. He was indicted jointly with William Wicks, who pleaded guilty.

"The money the subject of the indictment was obtained by the trick commonly known as 'ringing the changes.' The prisoners Hollis and Wicks went to an inn kept by the prosecutor; Wicks asked the barmaid for sixpenny worth of whisky—he put down a half sovereign, the barmaid gave him 9*s.* 6*d.* change. Wicks then said, 'Did I give you a half sovereign, I wish you would give it me back, I think I have change.' The barmaid gave him the half sovereign, but he did not return the 9*s.* 6*d.* At that moment the other prisoner Hollis asked for a cigar, which the barmaid gave him. He handed her a shilling in payment, and she returned him the change. Wicks then gave the barmaid 10*s.* in silver (9*s.* 6*d.* of which was the change she had previously given him) and a half sovereign, and asked her to give him a sovereign for it. She took the money to her master and received from him a sovereign which she gave to Wicks. Wicks then asked her to fasten his glove, upon which Hollis remarked 'Isn't he fussy.' The two prisoners then left, and in a few minutes afterwards the barmaid discovered the fraud. The barmaid stated in her evidence that she did not intend to part with her master's money except for full change of the prisoner's

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money, and her master also stated in his evidence that she had no authority to part with it except for full consideration.

"It was contended by counsel for the prisoner that the barmaid had general authority to act for her master in such a matter as giving change, and that the transaction was complete before she discovered the fraud, therefore that the property in the money had passed, and that the prisoner could not be convicted of stealing it.

"After referring to *Reg.* v. *McKale* (1), and *Reg.* v. *Middleton* (2), I overruled the objection, and the jury found the prisoner guilty; and in reply to questions put by me, also found specially that the barmaid had no intention to part with the property in the sovereign except for full change of the prisoner's money, and that her master had given her no authority to part with it for other than full consideration." The question reserved for the consideration of the Court was, whether the prisoner was properly convicted of larceny.

A. F. Godson, for the prosecution, submitted that *Reg.* v. *Middleton* (2) was decisive of the present case, and that the finding of the jury, that the barmaid had no right to part with the property, coupled with the fact that she never intended to do so, prevented any difficulty as to the conviction.

No counsel appeared for the prisoner.

LORD COLERIDGE, L.C.J. I cannot see if a person goes into a place and fraudulently, by a series of tricks, obtains possession of property from another which that other has no intention of parting with, how the offence can fail to be larceny. It is clearly stealing, and the conviction must be affirmed.

DENMAN, HAWKINS, WILLIAMS, and MATHEW, JJ., concurred.

Conviction affirmed.

Solicitors for prosecution: *King & Co., Stourbridge.*

(1) Law Rep. 1 C. C. R. 125; 37 L. J. (M.C.) 97.

(2) Law Rep. 2 C. C. R. 38; 42 L. J. (M.C.) 73.

C. D.

STRAUSS *v.* THE COUNTY HOTEL AND WINE COMPANY, LIMITED. 1883 *Nov.* 22.

Innkeeper—Liability for Property of Guest—Temporary Refreshment.

The plaintiff arrived at Carlisle with the intention of spending the night at the defendants' hotel, which adjoined the railway station. He delivered his luggage to one of the porters of the hotel, but, after reading a telegram which was waiting for him, decided not to spend the night at Carlisle, and went into the coffee-room to order some refreshments. He was not able to obtain in the coffee-room exactly what he required, and went into the station refreshment-room, which was under the same management as the hotel, and connected with it by a covered passage. Shortly afterwards he went out, telling the porter to lock up his luggage, and it was locked up in a room near the refreshment-room. On his return he found that part of it was missing :—

Held, that at the time of the loss of the plaintiff's goods there was no evidence of the relation of landlord and guest between him and the defendants, so as to make them responsible.

CLAIM that defendants were innkeepers and kept a common inn for the accommodation of travellers; that plaintiff, as a traveller, was received in the inn by them with his goods, consisting of a despatch box and dressing bag, &c.; that defendants did not, whilst the plaintiff was staying at their inn, keep the despatch box and dressing bag with their contents safely, and they were then wrongfully taken and carried away from the inn by persons unknown to the plaintiff and lost to him, and that they were taken away owing to the neglect or default of the defendants or their servants.

Defence denying the material allegations. Joinder of issue.

At the trial before Stephen, J., at the Carlisle Summer Assizes, 1883, it appeared that the plaintiff arrived about noon at the railway station at Carlisle, and was there met by one of the porters of the defendants' hotel, to whom he gave three packages, including the despatch box and dressing bag mentioned in the statement of claim, and asked him to take them to the hotel, which adjoined the railway station. He then intended to pass the night at the hotel, but, after reading a telegram which he found waiting for him at the office, he decided to go on to Manchester the same day. He went into the coffee-room to dine, but was told that there was no joint ready, and proceeded, by the

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waiter's advice, to the station refreshment-room, which was under the same management as the hotel, and connected with it by a covered passage. On his way to the refreshment-room he met the porter with his luggage, and told him to lock it up till he was ready to start for Manchester. The luggage was locked up in a room adjoining the refreshment-room, but on the plaintiff's arrival at the platform part of it was found to be missing. Upon the objection that there was no evidence that the plaintiff ever became a guest of the defendants at their inn, the learned judge ordered a nonsuit.

A rule having been obtained to set aside the nonsuit, or for a new trial,

E. Page (*J. W. Lowther*, with him), shewed cause, but was stopped.

Ambrose, Q.C., and *Mattinson*, in support of the rule. The plaintiff must be taken to have been a guest at the defendants' inn at the time when his luggage was lost. The right of the plaintiff to charge the defendants for the loss of his goods is not affected by the length of his stay at the inn: *Calye's Case* (1) and *Bennett* v. *Mellor* (2): it is not essential that he should have intended to spend the night there. He did not, by passing from the coffee-room into the refreshment-room, cease to be within the inn. The refreshment-room was connected with the house and was part of it. It might have been different if he had gone to the refreshment-room in the first instance as one of the public without any intention of visiting the rest of the house. The receipt of his luggage at the inn from the porter was a recognition of him as a guest. *Reg.* v. *Rymer* (3) only shews that a refreshment-bar used by those who pass by is not an inn.

LORD COLERIDGE, C.J. I think this rule must be discharged. The facts of the case, as I understand them, are these—[his Lordship stated the principal facts.] The law relating to the liability of innkeepers is fully considered in *Calye's Case* (1), and it is clear that in order to make the innkeeper liable at common law

(1) 1 Sm. L. C. 8th Ed. p. 140. (2) 5 T. R. 273.
(3) 2 Q. B. D. 136.

the plaintiff must have been a guest in the inn, according to the words of the Latin writ which is set out in the beginning of *Calye's Case*. (1) Now I can find no ground for saying that the plaintiff was in any sense a guest within the defendants' inn at the time when his luggage was lost. The case of *Bennett* v. *Mellor* (2) has been relied on by the plaintiff as shewing that it is not necessary to make the defendant liable that the guest should spend the night at the inn. But there it was expressly found that the plaintiff had come within the house and had placed his goods near his chair, so that the case is clearly distinguishable. On the other hand, the case of *Reg.* v. *Rymer* (3) is, so far as it goes, against the plaintiff. If there had been any positive proof of negligence on the part of the defendants they might possibly have been liable, but in the absence of such proof, and the relation of landlord and guest not having been made out, the action cannot be maintained.

MATHEW, J. I am of the same opinion. The counsel for the plaintiff were called upon to shew at what point of time the relation of landlord and guest commenced. They suggested that it was when the plaintiff gave his luggage to the porter. But at that time the plaintiff had not made up his mind to become a guest. The fact that he ordered his goods to be locked up, and that they were locked up, is no more than if he had said that he was uncertain whether he should stay in the inn, and that in the meantime he wished his goods to be locked up. In such a case there could be no liability. I am clearly of opinion that there was no evidence which the learned judge could have left to the jury.

Rule discharged.

Solicitor for plaintiff: *G. Johnson, for E. & E. L. Hough, Carlisle.*

Solicitors for defendants: *James, Son, & James, for Clutterbuck & Trevenen, Carlisle.*

(1) 1 Sm. L. C. 8th Ed. p. 140. (2) 5 T. R. 273.
(3) 2 Q. B. D. 136.

A. P. S.

1883
Nov. 20.

HESKE *v.* SAMUELSON & CO.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1—"*Defect in condition of machinery*"—*Machine unsuited for Purpose to which it was applied.*

The Employers' Liability Act, 1880, 43 & 44 Vict. c. 42—which gives a workman a right of action against his employer for personal injury by reason of any defect in the condition of the machinery used in the business of the employer—applies to a case where the machine, though not defective in its construction, was, under the circumstances in which it was used, calculated to cause injury to those using it.

The deceased, a workman in the employment of the defendants, was killed by a piece of coke falling from a lift used at a blast furnace belonging to them. The lift consisted of two platforms which ascended and descended alternately, and at the time when the deceased was injured he was removing empty barrows from the platform which was at rest at the bottom of the lift. There was evidence that the accident arose either from the sides of the lift not being fenced so as to prevent coke from falling over, or from the lower platform not being roofed so as to protect those working on it from falling coke:—

Held, that under the circumstances there was a "defect in the condition" of the lift for which the defendants were liable.

Appeal by motion from the ruling of the judge of the Middlesborough County Court.

The action was brought under 9 & 10 Vict. c. 93, for the benefit of the widow and children of a workman employed by the defendants. At the trial before the judge of the County Court of Middlesborough it appeared that the deceased was killed while working at a blast furnace belonging to the defendants by a piece of coke which fell from the top of a lift upon his head. This lift was used to raise coke to the top of the furnace, eighty-five feet above the ground, and consisted of two platforms which were made to ascend and descend alternately by means of machinery at the top, and it was the duty of the deceased to fill barrows with coke and wheel them on to the platform after removing the empty barrows. He sustained his injury while standing on the platform in the performance of this duty, and the case for the plaintiff was that there was a defect in the condition of this lift, inasmuch as the sides were not fenced so as to prevent coke from

falling over, and there was no roof to protect those on the platform from falling coke.

The judge held that a defect arising from the original construction of the machine was not a defect in the condition of the machinery within 43 & 44 Vict. c. 42, s. 1 (1), and gave judgment for the defendants.

A rule having been obtained for a new trial on the ground of misdirection,

R. V. Williams, for the defendants. The injury to the deceased was not caused by a "defect in the condition" of the defendants' machinery within the meaning of 43 & 44 Vict. c. 42. Where a machine is out of repair or incomplete there is, no doubt, a defect in its condition. But when a machine perfect in itself is applied to some purpose for which it is unfitted, it cannot properly be said that its condition is defective.

J. V. Austin, for the plaintiff, was not heard.

LORD COLERIDGE, C.J. I think that the ruling of the county court judge was wrong. The question is whether the fact that the machine was unfit for the purpose for which it was applied, constitutes a "defect in its condition" within 43 & 44 Vict. c. 42. The question really almost answers itself. If it was not in a proper condition for the purpose for which it was applied there was a defect in its condition within the meaning of the Act.

STEPHEN, J. I am of the same opinion. The argument for the defendants comes to this, that if the employer has a machine one part of which is weaker than it ought to be, there is a defect in its condition; but if the whole machine is too weak for the

(1) The Employers' Liability Act, 1880, 43 & 44 Vict. c. 42, gives a workman a right of action against his employer where personal injury is caused to him

(1.) By reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in the business of the employer.

(2.) A workman is not to be entitled to compensation under s. 1, sub-s. 1, unless the defect therein mentioned arose from, or had not been discovered or remedied, owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition.

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purpose for which it is applied, there is no such defect. Could it be said that if a windlass fit only for raising a bucket is used to draw up a number of men, that there is no defect in the condition of the machinery. The condition of the machine must be a condition with relation to the purpose for which it is applied.

Judgment for the plaintiff. Leave to appeal refused.

Solicitor for plaintiff: *E. T. Lewis.*

Solicitors for defendants: *Van Sandau, Cumming & Co.*, for *Belk, Middlesborough.*

A. P. S.

Nov. 28.

PALMER *v.* JOHNSON.

Vendor and Purchaser—Misdescription in Particulars of Sale—Effect of Acceptance of a Conveyance.

The acceptance of a conveyance of property does not debar the vendee's right to sue for compensation in respect of a breach of contract contained in the particulars and conditions of sale whereby the value of the land is diminished.

In March, 1882, the defendant put up for sale by auction certain freehold property described in the particulars of sale as producing a net annual rental of 39*l.* On the faith of such particulars the plaintiff became the purchaser for 650*l.* By one of the conditions of sale it was provided as follows:—"The property is believed and shall be taken to be correctly described: but, if any error, misstatement, or omission in the particular be discovered, the same shall not annul the sale, but compensation shall be allowed by the vendor or purchaser, as the case may require."

At the trial the jury found that the statement as to the amount of the net rental was inaccurate, and that the value of the property was thereby depreciated to the extent of 50*l.*

In August, 1882, a conveyance in fee of the property (without any covenants) was executed by the defendant to the plaintiff; and the latter entered into possession. In January, 1883, the plaintiff discovered that the rental of 39*l.* was a gross rental, the net rental being considerably less:—

Held, by A. L. Smith, J.,—upon the authority of *Bos* v. *Helsham* (Law Rep. 2 Ex. 72) and *In re Turner and Skelton* (13 Ch. D. 130),—that, notwithstanding his having accepted the conveyance, the purchaser was entitled to maintain an action for breach of contract.

Joliffe v. *Baker* (11 Q. B. D. 255) distinguished.

THIS case was tried at the last Summer Assizes at Nottingham before A. L. Smith, J., and was on the 17th instant argued before the same learned judge upon further consideration, by

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Buszard, Q.C., (*Stanger* with him), for the plaintiff, and by *Lawrence, Q.C.*, and *W. Graham*, for the defendant.

The pleadings, facts, and arguments are fully stated and the authorities discussed in the judgment, which was delivered on the 28th instant, as follows:—

A. L. SMITH, J. This was an action tried before me and a common jury at Nottingham at the last Summer Assizes. The plaintiff sued the defendant for damages, alleging that the defendant had on the 22nd of March, 1882, put up for sale by auction certain property and had described it in the particulars of sale as freehold property with an annual net rental of 39*l.*; that this was a misstatement; and that the plaintiff purchased upon the faith of such misstatement at the price of 650*l.*, whereby he was damnified.

The plaintiff based his claim, first, upon contract, to be compensated should any error, misstatement, or omission in the particulars of sale be discovered; and, secondly, upon a false and fraudulent representation made by the defendant. The last ground of claim wholly failed at the trial, and was negatived by the jury, and need not now be further considered by me.

As to the cause of action founded on contract, the plaintiff established that the defendant had advertised the property in question as having a net annual rental of 39*l.*, and that such statement was also incorporated in particulars of sale; that, upon the faith of such advertisement and particulars, he was induced to give 650*l.* for the property; that the property was only worth in fact 600*l.*; and that he was damnified to the extent of 50*l.*; that a particular of Lot 6 was annexed to the contract of purchase and incorporated therewith; and that the Lot was therein erroneously described. These facts were found by the jury, and must be taken to be the true facts of the case.

The plaintiff put in the contract of purchase, dated the 22nd of March, 1882, and the conditions thereto attached, as also the particulars of Lot 6 also attached thereto. The material parts of the contract are as follows,—"The undersigned, as agent for F. Tobin, the vendor, hereby acknowledges that the undersigned John Palmer is the highest bidder for and purchaser of the

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property described in the annexed particular as Lot 6, at the price of 650*l.*, subject to the foregoing special and common form conditions of sale, and that the purchaser has paid the sum of 65*l.* by way of deposit." The annexed particular of Lot 6 was as follows:—"Lot 6. Two freehold dwelling-houses (bay windows), being Nos. 22 and 24 Curzon Street, Nottingham, occupied by Messrs. Stanley & Co. Annual *net* rental, 39*l.*" The 12th condition of sale was as follows:—"The property is believed and shall be taken to be correctly described; but, if any error, misstatement, or omission in the particular be discovered, the same shall not annul the sale, but compensation shall be allowed by the vendor or purchaser, as the case may require; the amount of such compensation to be settled (regard being had to the purchase-money) by the auctioneer, whose decision shall be final." The auctioneer refused to adjudicate.

The defence set up at the trial was that the admitted mistake, viz. in describing the *net rental* as being 39*l.*, was fully explained to the plaintiff before he purchased; but this was negatived by the jury, and they found that he purchased the houses relying upon the fact and believing that the net rental was 39*l.*, as represented in the particulars.

On the 16th of August, 1882, a conveyance of the property was executed by the defendant to the plaintiff, and the plaintiff thereunder entered into possession thereof. It was a conveyance in fee of the property in question by the defendant to the plaintiff for the sum of 650*l.* There were no covenants whatever in the conveyance.

In January, 1883, the plaintiff discovered, as the fact was, that the rental described as being a net rental of 39*l.* per annum was a gross rental, the net rental being considerably below that sum.

Upon the jury finding the facts as aforesaid, the point was then taken by the defendant's counsel, that, inasmuch as the plaintiff had taken a conveyance of the property as above mentioned, the action was not maintainable, and that the case was covered by the decision of *Joliffe* v. *Baker*. (1) At the trial it was understood that that case was under appeal, and such in reality was the

(1) 11 Q. B. D. 255.

case; and by consent of parties it was arranged that the decision of this case should stand over until the appeal had been heard. It since, however, has been ascertained that, either from the insignificance of the amount at issue in that case or from some other cause the appeal had been abandoned. I am therefore now called upon to give judgment herein.

The point raised is as follows:—Is the plaintiff, who has a contract with the defendant that he (the defendant) will make compensation to the plaintiff should any error, misstatement, or omission be discovered in the particulars, and an error or misstatement as to the annual value of the property stated in the particulars is discovered after conveyance, debarred from maintaining an action against the defendant upon the contract because he the plaintiff has taken the conveyance of the property. I am of opinion that he is not.

The cases are as follows:—In *Carr* v. *Carr* (1), decided in the year 1830, the Vice-Chancellor (Shadwell) held that a vendee might maintain an action for damages for misrepresentation as to the value of property by the vendor, although a conveyance had been executed; and, having so held, he determined that the vendee was entitled to be recouped his damages out of the purchase-money which was then in Court. This decision, so far as it goes, is in favour of the plaintiff. The next case to which I need refer is that of *Bos* v. *Helsham* (2), decided in 1866. This is an express authority of the Court of Exchequer in favour of the plaintiff, and is wholly undistinguishable from the present case. There, as here, was a misstatement by the vendor as to the rental of the property sold. There, as here, a conveyance was executed, and afterwards the error was discovered and action brought. Baron Channell seems to me to put the case upon its right footing in his judgment, which, as to this point, is as follows (3): "The contract stands, possession has been taken, the conveyance executed, the price paid; and the only question as to the first breach is whether there is or is not a right to sue for compensation for an error in the particulars of sale discovered after the completion of the conveyance. I am of opinion that

(1) 3 Sim. 447. (2) Law Rep. 2 Ex. 72.

(3) Law Rep. 2 Ex. at p. 80.

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there is such a right. It is contended that the execution of the conveyance concluded the parties: but we are dealing with an express contract between them, from which the right to sue springs. Why should we limit it? Why should we say that, because the purchaser did not discover the error until after completion, he cannot sue for compensation? It seems to me that such a decision would be making a new contract between the parties different from that which they made themselves. Seeing, then, that the contract of sale can well stand, and yet that this claim, which is founded on an independent contract, can be enforced, I am of opinion that on the first breach the plaintiffs are entitled to our judgment." With every word of this I entirely agree.

In the year 1878 came the case of *Manson* v. *Thacker* (1). In that case, Vice-Chancellor Malins undoubtedly held that a vendee could not sue a vendor after conveyance for a misstatement contained in particulars of sale, although, as in the present case, the vendee had a contract with the vendor for compensation should errors or misstatements be discovered. The Vice-Chancellor, as it seems to me, founds his judgment upon the fact that, inasmuch as the vendee had had ample opportunity to discover the misstatement before conveyance executed, he therefore was guilty of laches, and consequently he could not maintain a claim for compensation. With this reasoning I cannot agree. Why mere laches are to deprive a man of a right which he has by contract I do not understand. It seems to me that, as long as the contract subsists, nothing short of a Statute of Limitations can prevent his obtaining the benefit conferred upon him by his contract. Moreover, in the present case I cannot find that the plaintiff has been guilty of laches. He purchased the property believing in the representation made by the defendant that he the defendant was receiving a net rental of 39*l.* per annum from the property. Why was the plaintiff not to believe it? Where was the plaintiff to go for information better than to the man who was in receipt of the rents and profits of the property, and who would know exactly what were the outgoings which would reduce the gross rental received to the 39*l.* net which he

(1) 7 Ch. D. 620.

represented? It seems to me to no one better than to the defendant. I therefore hold that in this case the plaintiff has been guilty of no laches; and, if the case of *Manson* v. *Thacker* (1) bound me, I should hold that the present case was distinguishable from that upon the above ground.

Later in the same year, Vice-Chancellor Malins decided the case of *Besley* v. *Besley*. (2) I may notice that in that case the plaintiff had no contract with the defendant to be paid compensation should an error or misstatement be discovered; nor does it appear to me that the plaintiff had any cause of action for damages by reason of a tort committed by the defendant: and I do not well see how he could support an action for damages against the defendant. The Vice-Chancellor, however, bases his judgment, as he did in the case of *Manson* v. *Thacker* (1), upon the fact that the vendee had been guilty of laches, and therefore refused to give him relief. I may notice that the plaintiff did not ask to have his contract rescinded, but to be compensated in damages.

In 1879, the case of *In re Turner and Skelton* (3) was decided by the late Master of the Rolls. There, as here, there was a contract for compensation. The late Master of the Rolls, as in *Bos* v. *Helsham* (4), held that the fact of a conveyance having been executed did not disentitle the vendee to maintain his action for compensation under his contract with the vendor. In the same year Vice-Chancellor Malins decided the case of *Allen* v. *Richardson* (5), adhering to his former decisions.

These authorities bring me down to the case of *Joliffe* v. *Baker* (6), in the judgment of which I took part. The ground of my decision in that case was that, the action being an action for damages, the plaintiff could only succeed if he could establish a contract with the defendant and a breach of it by him, or an actionable tort committed by the defendant whereby the plaintiff had suffered damage. The tort being in my judgment negatived, and it not being suggested that the plaintiff had any contract with the defendant entitling him to compensation and

(1) 7 Ch. D. 620.
(2) 9 Ch. D. 103.
(3) 13 Ch. D. 130.
(4) Law Rep. 2 Ex. 72.
(5) 13 Ch. D. 524.
(6) 11 Q. B. D. 255.

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it not being a case where the plaintiff was asking for a rescission of his contract, I was of opinion. and still am, that the plaintiff could not maintain his action. My Brother Cave concurred in the judgment, on the ground that in his opinion there was no misrepresentation in fact established in that case. I am aware that my Brother Williams held a strong opinion upon the point now raised, and has expressed it in his judgment. That part of the case I never heard argued; nor was it in the judgment of my Brother Cave and of myself necessary to decide the point in that case. Having, however, now had the advantage of hearing the arguments in this case, I am unable to agree with that part of the judgment of my Brother Williams which holds that after conveyance a vendee's right to sue upon his contract for compensation is gone: and I prefer the reasons given in the cases of *Bos* v. *Helsham* (1) and *In re Turner and Skelton* (2); and also by those cases, had I considered otherwise, I should have felt myself bound.

There was a point taken before me on the part of the defendant on the argument herein, that, by the contract of the 22nd of March, 1882, and the conditions of sale which formed part thereof, and the particulars of sale attached thereto, the plaintiff had no contract for compensation with the defendant. With this contention I am unable to agree; and I hold that the plaintiff had such a contract.

It was also urged that, if there was such a contract, the same became merged in the conveyance of the 16th of August, 1882; and it was argued that the conveyance was the only existing contract between the plaintiff and the defendant, and that it was only to the conveyance and the rights thereby created that the Court could now look. For that proposition the judgments of Lord Justice James and Lord Justice Brett in the case of *Leggott* v. *Barrett* (3) were cited. It seems to me that the judgments in that case are manifestly distinguishable from the point under consideration. All that was there held was, that, where the parties enter into a preliminary contract which is afterwards to be carried out by a deed to be executed, there the

(1) Law Rep. 2 Ex. 72. (2) 13 Ch. D. 130.
(3) 15 Ch. D. at pp. 309, 311.

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completed contract is to be found in the deed, and that the Court has no right whatever to look at the preliminary contract.

In this case, the preliminary contract as to compensation to be paid never was to be carried out by a deed. The deed, as it did, was only to convey the estate from the vendor to the vendee; and, as a matter of fact, it is, as before stated, a simple conveyance in fee, without a single covenant being inserted therein.

It seems to me that the contract for compensation stands, and that the plaintiff is entitled to sue upon it, although he has taken a conveyance: and, being of that opinion, I give judgment for the plaintiff for 50*l.*, and with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Swann & Co., for E. N. Elborne, Nottingham.*

Solicitors for defendant: *Lee, Ockerby, & Everington, for Bright, Nottingham.*

J. S.

[IN THE COURT OF APPEAL.]

Nov. 19.

HALL *v.* BRAND AND OTHERS.

Evidence—Witness out of Jurisdiction—Arbitration—Reference of Action and "All Matters in Difference"—"Trial"—17 & 18 Vict. c. 34, s. 1.

When an action and "all matters in difference" between the parties have been referred by consent to an arbitrator, no writ of subpœna will be granted under 17 & 18 Vict. c. 34, s. 1, in order to compel the attendance at the hearing before the arbitrator of witnesses residing within the United Kingdom but out of the jurisdiction of the Queen's Bench Division; for the hearing before the arbitrator is not a "trial" within the meaning of that enactment.

THE defendants resided at Glasgow, in Scotland, and by consent an order had been made by a master at chambers referring the cause "and all matters in difference" to an arbitrator, who was to have power to enter judgment. The order of reference was made before the 24th of October, 1883. The defendants were desirous of subpœnaing a person residing in Scotland to attend as a witness at the hearing and to give evidence before the arbitrator. Application was accordingly made on their behalf to the

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Queen's Bench Division for leave to issue a subpœna under 17 & 18 Vict. c. 34, s. 1 (1), to be served in Scotland. It did not clearly appear whether the witness was to be examined as to matters arising in the action or as to other matters in dispute.

The application having been refused in the Queen's Bench Division, the defendants appealed.

Maurice Powell moved on behalf of the defendants. The subpœna ought to be issued for service in Scotland. The hearing before the arbitrator is a "trial" of the cause referred to him within the meaning of 17 & 18 Vict. c. 34, s. 1. In the present case the reference is by consent, and this circumstance distinguishes it from *O'Flanagan* v. *Geoghegan* (2), where the reference to the master was compulsory. Moreover, that decision is not binding upon this Court. A hearing before a referee under the Supreme Court of Judicature Act, 1873, ss. 56, 57, is merely a mode of trial: Rules of the Supreme Court, 1875, Order XXXVI. rule 30; and surely the arbitration is a proceeding of the same nature, and the arbitrator is a "referee" within the meaning of those enactments.

[BOWEN, L.J. The Rules of Court relate merely to matters of procedure, they cannot give power to bring witnesses from Scotland into England.]

The defendants are Scotchmen; are they to be forced to attend themselves the hearing before the arbitrator in England, and yet

(1) By 17 & 18 Vict. c. 34, s. 1, "If, in any action or suit now or at any time hereafter depending in any of Her Majesty's Superior Courts of Common Law at Westminster or Dublin, or the Court of Session or Exchequer in Scotland, it shall appear to the Court in which such action is pending, or, if such Court is not sitting, to any judge of any of the said Courts respectively, that it is proper to compel the personal attendance at any trial of any witness who may not be within the jurisdiction of the Court in which such action is pending, it shall be lawful for such Court or judge, if in his or their discretion it shall so seem fit, to order that a writ called a writ of subpœna ad testificandum, or of subpœna duces tecum, or warrant of citation, shall issue in special form, commanding such witness to attend such trial wherever he shall be within the United Kingdom, and the service of any such writ or process in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if same had been served within the jurisdiction of the Court from which it issues."

(2) 16 C. B. (N.S.) 636.

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to be unable to compel the attendance of their witnesses resident in Scotland? Surely an arbitrator is a "referee" within Rules of the Supreme Court, 1875, Order XXXVI. rule 2. If the hearing before the arbitrator is not a "trial" within the meaning of 17 & 18 Vict. c. 34, s. 1, it will follow that that statute applies only to trials as they existed in courts of common law when it was passed, that is, to trials before a judge and a jury; it will not apply even to trials before a judge alone; for that mode of procedure was first introduced into courts of common law by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 1, which, although it was passed in the same session, received the royal assent subsequently to 17 & 18 Vict. c. 34. The hearing before a referee or arbitrator is only part of the proceedings in the cause: *Longman* v. *East.* (1) It is merely reasonable that the defendants should be allowed to subpœna any persons, who may be thought likely to assist their case: *Harris* v. *Barber.* (2) The Court has a discretion in granting the subpœna: *Allen* v. *Duke of Hamilton* (3); and in the present case that discretion ought to be exercised in the defendants' favour. It is not contended for the defendants that the subpœna ought to be allowed to issue, if the witness were required to give evidence only as to the matters in difference other than the action; and this Court may, if it think fit, direct that the witness shall be examined only as to matters arising in the cause.

BRETT, M.R. An action has been brought, and an order has been made by consent that the cause and "all matters in difference" shall be referred to a person named, who is to have power to enter judgment according to his award. An application is now made for leave to issue a subpœna for service in Scotland upon a person, whose evidence, we must take it, is material to be received. The Queen's Bench Division have thought that the present case is not within the provisions of 17 & 18 Vict. c. 34, s. 1, and an appeal is now brought before us. Before that statute was passed, the ordinary mode of trying an action was before a judge and a jury; by the Common Law Procedure Act, 1854, s. 1, an agreement in writing might be arrived at between the

(1) 3 C. P. D. 142. (2) 25 L. J. (Q.B.) 98. (3) Law Rep. 2 C. P. 630.

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parties whereby a cause might be tried before a judge alone. Under the Rules of the Supreme Court, 1875, Order XXXVI., rule 2, actions may be tried before a judge alone, or a judge and jury, or an official or special referee. It has been in effect contended that each of these modes of trial is a "trial" within the meaning of 17 & 18 Vict. c. 34, s. 1; and therefore that a witness may be brought upon a subpœna from Scotland. It is contended that the hearing before the arbitrator is the "trial" of the cause. I will not undertake to say that if nothing but the cause had been referred to a special referee under the Supreme Court of Judicature Act, 1873, s. 57, it would not be a "trial" within the meaning of 17 & 18 Vict. c. 34, s. 1: I will not undertake to say that the reference of a cause alone to an arbitrator is not a "trial:" I will not undertake to say that where there has been a reference for report under the Supreme Court of Judicature Act, 1873, s. 56, it is not a "trial." I confine myself to the facts before us. The present reference includes "all matters in difference:" the position of the parties is the same as if the writ had not been issued, and as if they agreed to submit all their disputes to the award of an arbitrator: the master had by consent jurisdiction to make the order of reference; and the question is whether the hearing before the arbitrator is a "trial," he having power to enter judgment in the action. I doubt whether it can be said after the reference that the action is "depending" in the High Court; but I do not decide on this ground: I decide on the ground that a hearing of all matters in difference cannot be said to be the "trial" of the cause. I may point out that upon a different construction of the statute a witness may be subpœnaed from Scotland to attend the "trial" of the action, and then at the hearing of the arbitration may be examined only as to the matters in difference. It is said that an order may be made limiting the examination of the witness to questions arising in the action; but I have never heard of a restriction of that kind being imposed. The hearing of the cause together with all matters in difference, is not a "trial" of the action, and we ought not to grant an order that the subpœna may issue for service in Scotland.

BAGGALLAY, L.J. I am of the same opinion. In the present

case, the reference is of "all matters in difference," and not merely of the action.

BOWEN, L.J. I am of the same opinion, for the same reasons. The statute 17 & 18 Vict. c. 34, s. 1, relates to the procedure of Courts of Common Law. I say nothing as to the process of the Court of Chancery, and I do not say that the judges of the Chancery Division may not now have the power to avail themselves of the provisions of that statute. Nor do I say that those provisions will not apply to every mode of trial which may have been or may be substituted for trial by a judge and a jury; but I do say that they apply only to the trial of an action. In the present case there has been a reference of "all matters in difference:" the arbitrator is empowered to decide all matters in dispute as well as the action; this circumstance by itself shews that the hearing before the arbitrator cannot be deemed to be a mere "trial" of the action. For anything that we can tell, the attendance of the witness may be wanted for the purposes not of the action, but of matters in difference outside the action. Reliance has been placed upon Rules of the Supreme Court, 1875, Order XXXVI., rule 2; but that applies only to the reference of an action. The Queen's Bench Division has no power to order that witnesses shall be brought out of Scotland to attend a reference in England before a mere arbitrator, who is trying matters outside the scope of a pending litigation; and I even think it doubtful whether, after an order has been made referring an action to an official or special referee under the Supreme Court of Judicature Acts, 1873, 1875, a subpœna can be granted under 17 & 18 Vict. c. 34, s. 1, though I express no opinion on the point. At all events, a reference of an action together with "all matters in dispute" to an arbitrator is more than a mere step or proceeding in the cause, and the hearing of such a reference is more than a mere "trial" of the action within 17 & 18 Vict. c. 34. I express no opinion as to what may be the law, if the witness was shewn merely to be wanted for the trial before the arbitrator of the matters at issue in the action itself.

Motion refused.

Solicitors for defendants: *Blount, Lynch, & Petre.*

J. E. H.

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Nov. 19.

[IN THE COURT OF APPEAL.]

IN RE C. DUDLEY.

Contempt of Court—Attachment—Solicitor—Order for Payment of Money—Punitive and disciplinary Process.

A solicitor received on behalf of a client a sum of 339*l.*, which he paid into his account with his own bankers and dealt with as his own money. He afterwards forwarded to his client a sum of 100*l.*, and refused to pay the balance, on the ground that he had a claim against an agent whom his client had employed to communicate with him. Application having been made to the Queen's Bench Division to compel the solicitor to pay the money, the matter was referred to a master, who reported that the balance was due from the solicitor to his client. An order was made by the Queen's Bench Division, and also a subsequent order was made at chambers, that the solicitor should pay the balance claimed to his client. These orders not having been complied with, an order for the attachment of the solicitor was made by a judge at chambers :—

Held, that the orders for the payment of the balance claimed were not merely in the nature of civil process, but were orders made against the solicitor as an officer of the Court, and that the attachment was properly granted.

In re Ball (Law Rep. 8 C. P. 104) explained.

In re Freston (11 Q. B. D. 545) followed.

C. DUDLEY was a solicitor of the Supreme Court.

In April, 1880, Sarah Monet and T. H. Rees, who both resided in the United States, became entitled to receive out of the Chancery Division of the High Court a sum of 339*l.* 11*s.* 9*d.* In December, 1880, G. Crump, the British vice-consul at Philadelphia, acting on behalf of S. Monet and T. H. Rees, forwarded a power of attorney to Dudley to receive the sum above-mentioned on their behalf. At the end of December, Dudley, acting under the power of attorney, received this sum, and notified the receipt thereof to Crump. Dudley did not remit it to S. Monet and T. H. Rees, but paid it into his own account at his banker's, and dealt with it as if it were his own money. T. H. Rees gave S. Monet a power of attorney to enable her to receive the sum due from Dudley. On the 21st of May, 1881, after many applications had been made to Dudley for payment without effect, he wrote to Crump enclosing a banker's draft for 100*l.* on account of the sum of 339*l.* 11*s.* 9*d.*, but, although repeated applications had been

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made to him for the balance, he failed to remit any more. On the 7th of March, 1882, a rule nisi was obtained in the Queen's Bench Division calling on Dudley to shew cause why he should not in his character of an officer of that court pay to S. Monet the sum of 239*l.* 11*s.* 9*d.*, being the balance still in his hands, and on the 22nd of March, 1882, an order of the Queen's Bench Division was made referring the matters of the above-mentioned rule to one of the masters to inquire and report thereon. On the 17th of April, 1882, the master having heard the evidence adduced before him, and acting in pursuance of the order of the 22nd of March, issued his report, whereby he found that subject to the question arising upon the claims of Dudley against Crump hereafter mentioned, Dudley never had had, since he received the sum of 339*l.* 11*s.* 9*d.* above-mentioned, any claim to retain it, but had wrongfully refused to remit and pay it to Crump and S. Monet. The principal claim alleged by Dudley against Crump was that Crump was his agent for the sale of a piece of land situate near Chicago in the United States, and Dudley claimed to retain the sum of 239*l.* 11*s.* 9*d.* the balance above-mentioned until Crump should have sold the piece of land near Chicago, and then to set off the price in account against Crump. The master found that at the time of issuing his report Crump was not the agent of Dudley for the sale of the land near Chicago. The other claims of Dudley against Crump either had been paid off or were of trifling amount. By an order dated the 21st day of April, 1882, the Queen's Bench Division ordered Dudley to pay to S. Monet the sum of 239*l.* 11*s.* 9*d.* besides the costs of the proceedings, including the reference to the master and his report. These costs were afterwards taxed at 47*l.* 2*s.* 8*d.* This order was not personally served on Dudley. By an agreement in writing dated the 22nd day of April, 1882, S. Monet agreed to accept the sum ordered to be paid to her by the Queen's Bench Division by certain instalments; but it was provided that in the event of any of the instalments remaining unpaid, the whole amount then unpaid was to become immediately due. Under the arrangement contained in the agreement above-mentioned, sums amounting to 44*l.* were paid either by or on behalf of Dudley, but otherwise the instalments remained wholly unpaid. By an order made

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at chambers, and dated the 24th of March, 1883, Hawkins, J., ordered that Dudley should pay to S. Monet on or before the 10th of April, the sum of 242*l.* 14*s.* 5*d.*, the balance due under the order of Court made the 21st of April, 1882, and the allocatur indorsed thereon. On the 9th of April (the order not having been served on account of Dudley keeping out of the way, and it being impossible to find him), Manisty, J. enlarged the time therein mentioned until ten days after service of the order, and on the 17th of April, Dudley was personally served with it; he did not comply with it. By an order at chambers dated the 27th of June, 1883, Huddleston, B., ordered that a writ of attachment should issue against Dudley for his default in paying to S. Monet the sum of 242*l.* 14*s.* 5*d.* Notice of motion to dismiss the order of Huddleston, B., was given, and Dudley filed an affidavit stating that he was entirely without the means of paying the sum ordered to be paid by him, and that through distress of mind he had been totally unable to earn any money. The Queen's Bench Division (Grove and Manisty, JJ.), on the 12th of July, 1883, rescinded the order of Huddleston, B. Their Lordships were of opinion that the Debtors Act, 1869, s. 4, sub-s. 4, was not punitive as against solicitors, and that Dudley had not been guilty of legal fraud, and that the attachment ought not to be granted.

S. Monet appealed.

Fraser MacLeod, for S. Monet. This case is concluded in favour of S. Monet by the principles laid down in the judgments of the Court of Appeal in the case of *In re Freston* (1), which was not cited before the Queen's Bench Division.

Mundy, for Dudley. The decision of the Court of Common Pleas in *Re Ball* (2) is a clear authority in favour of Dudley. In the present case no order has been made that the solicitor should answer the matters in an affidavit. The orders of the Queen's Bench Division and of Hawkins, J., for the payment of the money to S. Monet, were really civil process only, and were merely in the nature of judgments obtained in actions at law. S. Monet cannot now proceed to punish Dudley; for his affidavit shews that his failure to comply with the orders made against

(1) 11 Q. B. D. 545. (2) Law Rep. 8 C. P. 104.

him has not been wilful, he having no money to enable him to satisfy the claim made against him.

Fraser MacLeod, was not called upon to reply.

BRETT, M.R. I am unable to agree with the decision of the Queen's Bench Division. I must adhere to what was laid down by this Court in the case of *In re Freston*. (1) The jurisdiction of the High Court over a solicitor is of a peculiar nature. When there has been a default upon his part, the Court may make different kinds of orders; if an order is made against a solicitor merely for the payment of a sum of money, it may be that he is within the protection of the general clauses of the Debtors Act, 1869. But the Court has also a jurisdiction of another kind. If a solicitor has improperly dealt with or has misappropriated the money of his client, the Court can inquire into the facts; if a solicitor has simply through misfortune failed to pay over the money to his client, perhaps a punitive order will not be made against him; but if he has acted dishonestly, forthwith an order to attach him may be made. The object of this procedure was to secure honesty in the conduct of solicitors. In *Re Robinson* (2), which was followed in *Re Ball* (3), it was suggested that the proper mode of proceeding in pœnam against a solicitor was to order that he should answer the matters in the affidavit; that is the more regular process. But I do not think that the judges meant that that was the sole course, but merely that when a solicitor has been ordered to answer, it is conclusive that the proceedings against him are in pœnam. In the present case, to my mind the question is whether the order made against the solicitor was made against him as officer of the Court. The circumstances are that he paid the money received on behalf of his client into his own banking account, and dealt with it for his own purposes; and by way of defence for his conduct, he alleges that he was excused from paying over the money to his client because he had a claim against the agent whom she had employed to communicate with him. The facts were inquired into before the master. It is obvious that the inquiry was directed by force

(1) 11 Q. B. D. 545. (2) 10 B. & S. 75.
(3) Law Rep. 8 C. P. 104.

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of the superintendence and control exercised by the Court over solicitors. The order was punitive, for the master having the parties before him, made a report. The order of the Queen's Bench Division was an order to make him answer the matters complained of before the master. Time and indulgence were given to the solicitor to enable him to pay the money; an agreement was entered into between the solicitor and the client who was taking proceedings against him. If he had observed the terms of that agreement, she could not turn round upon him and apply for an attachment against him on the ground that he had not complied with the order of the Court. However, another order was made at chambers, and that was a disciplinary and punitive order. This order was not complied with, and Huddleston, B., at chambers, in the exercise of his discretion, made an order for the attachment of the solicitor. The judges of the Queen's Bench Division were of opinion that he had no jurisdiction to make that order. I am of opinion that he had. I think that we ought not to interfere with the exercise of the discretion of Huddleston, B. I do not say that this Court in no case should interfere with the discretion exercised by a judge at chambers; but I think that Huddleston, B., was right, and his order must be affirmed.

BAGGALLAY, L.J. I am of the same opinion. I agree generally with the decision of this Court in the case of *In re Freston* (1), and I agree in particular with the exposition by the Master of the Rolls of the law as to the jurisdiction and control exercised by the Courts over solicitors. (2) The principles there laid down are stated in concise, and at the same time in very clear, language. In the present case I can come to no other conclusion than that the order made in the Queen's Bench Division was intended to be disciplinary and punitive. The order in *Re Ball* (3) was intended simply to secure the payment of money, and was treated as a civil proceeding. Here the procedure was different; there was a reference to the master, who made a report, and it falls within the exception mentioned in that case; for

(1) 11 Q. B. D. 545. (2) 11 Q. B. D. 545, at p. 554.
(3) Law Rep. 8 C. P. 104.

special circumstances existed which justified disciplinary or punitive proceedings. The order for the attachment was properly made by Huddleston, B., and if the case of *In re Freston* (1) had been brought to the notice of the Queen's Bench Division when this case was before it, no doubt the result would have been different.

BOWEN, L.J. In the present case Huddleston, B., sitting as a judge at chambers, exercised his discretion; the Queen's Bench Division overruled his decision on the ground that it was wrong in point of law. Unless we think the view of the Divisional Court right, we ought to support the judge at chambers in the exercise of his discretion. The Court below has thought that the order for attachment could not be upheld. I think that that view is inconsistent with the decision of this Court in the case of *In re Freston.* (1) In my opinion the view there taken of the liability of solicitors to punishment was not new. By the Debtors Act, 1869, imprisonment for debt or default in the payment of money was with certain exceptions abolished. One of those exceptions relates to solicitors who make default, as officers of the Supreme Court, in payment of money; these solicitors are left to the operation of the former law. *Re Ball* (2) was simply a case where money had been ordered to be paid by the Court. The language of Cockburn, C.J., in *Re Robinson* (3), shews that an attachment may be granted where special circumstances exist. Here a default has been committed, which brings the solicitor within the Debtors Act, 1869, s. 4, sub-s. 4. When an order has been made for the payment of money by a solicitor, it is not to be assumed against him that it has been made upon him as an officer of the Court; but in the present case the proceedings shew that the order of the Queen's Bench Division was made upon the solicitor in his capacity of officer of that Court. There was a reference to a master, who made a report to the Court. Before the master no real defence was made to the case set up against the solicitor; but he was proved to have been guilty of very gross and culpable misconduct, and he was also

(1) 11 Q. B. D. 545. (2) Law Rep. 8 C. P. 104.
(3) 10 B. & S. 75.

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liable to pay the money claimed to be due from him to S. Monet. Either civil process could be issued or the disciplinary powers of the Court could be put in force; and S. Monet, as she was entitled to do, availed herself of the latter remedy. The decision of the Queen's Bench Division would no doubt have been different, if the attention of the learned judges had been drawn to all the previous decisions upon the subject.

Appeal allowed and order of Huddleston, B., affirmed.

Solicitors for S. Monet: *Marsland, Hewitt, & Everett.*
Solicitor for C. Dudley: *G. D. Dudley, Oxford.*

J. E. H.

Dec. 1.

LENDERS *v.* ANDERSON.

Practice—Service of Writ of Summons out of the Jurisdiction—Order XI., rules 1 (*e*) *and* 2*—Action for Breach of Contract—Defendant domiciled or ordinarily resident in Scotland or Ireland.*

There is no power to allow service of a writ out of the jurisdiction in actions for breach of contract under Order XI., rule 1 (*e*), where the defendant is domiciled or ordinarily resident in Scotland or Ireland.

APPLICATION to set aside service of the writ of summons referred by Field, J., from chambers to the Court.

The action was for alleged breach within the jurisdiction of a contract which by its terms was to be performed within the jurisdiction.

The defendant was a Scotchman domiciled in Scotland, and leave having been granted under Order XI. (Rules of the Supreme Court, 1883), by Field, J., for service of the writ out of the jurisdiction, it had been served upon him in Scotland.

Finlay, Q.C., and *Nicoll*, moved, under Order XII., rule 30, to set aside the service. The clause of Order XI., rule 1, upon which this case turns, is clause (*e*). That contains a distinct exception of cases where the defendant is domiciled or ordinarily resident in Scotland or Ireland. Down to the time of the Judicature Act, 1875, there was no power to serve a defendant in

Scotland or Ireland, those countries being expressly excepted from s. 18 of the Common Law Procedure Act, 1852. The words of clause (*e*) are as plainly intended to restore the previous state of things as words can be.

Gorell Barnes, for the plaintiff, shewed cause. Rule 1 (*e*) and rule 2, of Order XI., must be read together, and the fair construction of them when so read is that in cases coming within the last words of rule 1 (*e*) it was not intended to take away the discretion of the Court or judge to allow service out of the jurisdiction altogether, but merely to render it subject to the considerations mentioned in rule 2. Unless that construction is adopted there are really no cases under Order XI., rule 1, to which the latter part of rule 2 could apply. To what cases under rule 1 could the question whether there was concurrent jurisdiction in a Small Debts Court in Scotland or Ireland apply except to cases of breach of contract under rule 1 (*e*)? It could not apply to rule 1 (*a*) or (*b*). It may perhaps be argued that rule 2 would apply to some cases under rule 1 (*c*), viz., cases of defendants domiciled within the jurisdiction but temporarily resident in Scotland or Ireland; but it can hardly have been intended to apply only to such cases.

[HUDDLESTON, B. The plaintiff's contention is that under rule 1 (*e*) the leave is practically to be granted as of course except in the case of persons domiciled or ordinarily resident in Scotland or Ireland; but that in the case of such persons the discretion of the Court or judge is not unfettered, but must be exercised with reference to certain considerations mentioned in rule 2.]

It is not to be supposed that such a complete change from the previous practice under the Rules of 1875 was intended to be introduced by words incidentally inserted by way of limitation on clause (*e*). If there had been such an intention there would have been a substantive rule on the subject. The construction suggested for the defendant would really leave very few cases in which the necessity for service in Scotland or Ireland could arise. Rule 2 could not have been intended to have so limited an application. It seems reasonable that a defendant who chooses to contract to do something in this country should, if he breaks his contract, be liable to be sued in this country.

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Finlay, Q.C., in reply. The new rules do not, with certain exceptions, admit of service out of the jurisdiction in actions of tort, which was allowed under the Rules of 1875, so that it is clear there was an intention to change the law to a very considerable extent. There is nothing improbable in the contention that the intention was to return to the old practice as it existed before 1875, for the general maxim of law is "actor sequitur forum rei." Rule 2 can be construed as having reference to cases other than cases under clause (*e*). The jurisdiction of the Sheriff's Court in Scotland is not confined to debts. It has jurisdiction under 40 & 41 Vict. c. 50, over suits relating to real property to the value of 1000*l.* or 50*l.* per annum.

Cur. adv. vult.

Dec. 1. GROVE, J. This case raises a very important question with regard to the effect of Order XI., rules 1 and 2. The action was for alleged breach of a contract within the jurisdiction, and the defendant was a person domiciled in Scotland. The sole question now before us is whether the Court can give leave to serve a writ out of the jurisdiction on such a defendant. Order XI., rule 1, provides that service out of the jurisdiction may be allowed "whenever (*e*) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made which according to the terms thereof ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland." The question depends on the construction to be put on those words. The words taken by themselves seem to be perfectly clear, and to import, in their natural signification, that in cases where the action is for breach of contract as specified in the clause, and the defendant is domiciled or ordinarily resident in Scotland or Ireland, there can be no service out of the jurisdiction. In this case, therefore, the defendant being domiciled in Scotland cannot be served out of the jurisdiction unless there is some reason for giving the words of the clause a meaning wholly different from that which they would naturally bear. It was argued that there was such reason on various grounds. It was said that unless rule 2 was construed as applicable to cases under clause (*e*) it could have no application at all. So far as

the wording of rule 2 is concerned it expressly refers to the whole of the last preceding rule. It provides that "where leave is asked from the Court or a judge to serve a writ under the last preceding rule in Scotland or in Ireland, if it appear to the Court or judge that there may be a concurrent remedy in Scotland or Ireland (as the case may be), the Court or judge shall have regard to the comparative cost and convenience of proceeding in England or in the place of residence of the defendant or person sought to be served," &c. It is argued that that rule can only have application to cases coming within the concluding words of clause (*e*) of rule 1, and therefore that those words, "unless the defendant is domiciled or ordinarily resident in Scotland or Ireland," and the 2nd rule taken together must mean that in such cases the Court before putting rule 1 into operation and giving leave to serve the writ out of the jurisdiction must take into consideration the matters mentioned in rule 2. I do not however agree that rule 2 is only applicable to cases falling within the concluding words in clause (*e*). The rule is expressed to be applicable to all of the preceding rule, and even assuming that it could not apply to all the cases mentioned in the clauses of rule 1, yet if it applies to some of them other than those of actions for breach of contract against persons domiciled in Scotland or Ireland the argument appears to me to fail. Again, it was urged that it was unlikely that it could have been intended to make such a very sweeping exception from the provision with regard to service out of the jurisdiction in actions of contract as would be involved if all cases where the defendant was domiciled in Scotland or Ireland were excepted, and that the consequence would be that the exception would be larger than the rule. This argument might have some weight if we were legislators, but it cannot prevail when the language of the statute is plain and unambiguous; and again, it seems to be answered by the fact that the legislature did make this exception in s. 18 of the Common Law Procedure Act, 1852, and that the state of the law in this respect continued unaltered down to the passing of the Judicature Act. That fact seems to me to answer the argument from improbability. If one may guess the reasons for an enactment it seems probable that, there being in Scotland and Ireland Superior

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Grove, J.

Courts quite competent to deal with such actions, it was considered reasonable that the defendant should not be brought into an English court; but that the ordinary maxim should prevail by which the party suing is bound to follow the party sued. Whether this is so or not, the argument ab inconvenienti is only valuable when the language of the statute is ambiguous. Here the words of the statute seem to me quite plain; but, so far as I can see, there may have been very good reasons for returning to the old practice under the Common Law Procedure Act. It was suggested during the argument by my brother Huddleston that the effect of the 1st rule of Order I. may be that under that rule the order for service out of the jurisdiction is generally to be allowed as of course; but that where "leave is asked" to serve a writ in Scotland or Ireland it is to be something special, and then the Court must consider the matters mentioned in the 2nd rule, and that this rule applies to the cases of domiciled Scotchmen or Irishmen mentioned in clause (*e*) of the previous rule. The answer to this suggestion seems to be, that the power given by rule 1 is plainly discretionary. In all cases leave has to be asked, so that the words "leave is asked" in the 2nd rule do not shew that the granting of leave under rule 1, is anything but discretionary. It appears to me, therefore, that the words of rule 1, clause (*e*), are perfectly plain, and that there is nothing in the context or the reason of the thing to negative their natural construction. The result is, that there was no power in this case to give leave for service out of the jurisdiction, and this application must be allowed.

HUDDLESTON, B. I am of the same opinion. This question is one of importance as affecting a very large number of cases in which, according to the old rules, application might have been made for leave to serve a writ out of the jurisdiction. We are asked by the defendant to say that by the new rules there is no longer any power to give such leave in these cases. I own that at first I thought the argument for the plaintiff might be well founded, and that, although the concluding words in Order XI., rule 1 (*e*), are strong, it was very doubtful whether it could have been intended to make so extensive a change in the practice by those

words, and whether, if such had been the intention, it would not rather have been expressed clearly in a separate rule by itself. I also thought an argument arose in favour of the plaintiff by reason of the wording of rule 2. But on reflection I have come to the conclusion that the contention of the defendant is correct. This is an application under Order XII., rule 30, to set aside the service of the writ upon the defendant. The question, therefore, for us is whether there was power in this case to give leave for the service of the writ out of the jurisdiction.

The power to grant such leave is given by Order XI., and rules 1 and 2 of that order are those upon which this question chiefly turns. Rule 1 enacts that service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed in seven classes of cases enumerated in the sub-clauses of the rule. It is to be observed that the power which previously existed of allowing service out of the jurisdiction in actions of tort is taken away except so far as such a power is involved in sub-clauses (*a*), (*c*), or (*f*), and therefore a very considerable change was undoubtedly contemplated by the new rules. Clause (*e*) is the clause upon which this case turns. That clause provides for service out of the jurisdiction in actions for breach within the jurisdiction of a contract to be performed within the jurisdiction "unless the defendant is domiciled or ordinarily resident in Scotland or Ireland." These words appear to be an explicit exception of actions for breach of contract against defendants domiciled or ordinarily resident in Scotland or Ireland, but it is to be observed that they do not prevent service in such actions on persons in Scotland or Ireland who are not domiciled or ordinarily resident in those countries. Then by rule 2 it is provided that "where leave is asked from a Court or judge to serve a writ under the last preceding rule in Scotland or Ireland, if it shall appear to the Court or judge that there may be a concurrent remedy in Scotland or Ireland, as the case may be, the Court or judge shall have regard to the comparative cost and convenience of proceeding in England or in the place of residence of the defendant or person sought to be served, and particularly in cases of small demands to the powers and jurisdiction under the statutes establishing or regulating them of the

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Sheriffs' courts or Small Debts courts in Scotland and of the Civil Bill courts in Ireland respectively." It is easy to understand the objects of the framers of this rule, for it is obvious that where there is a concurrent remedy, before allowing the writ to be served in Scotland or Ireland, it is reasonable to consider the balance of convenience, and, when the demand is a small one, what local courts may exist for the purpose of dealing with such demands. The argument for the plaintiff is that this rule could have no application if it were held that the effect of rule 1 (*e*) was absolutely to exclude from the provisions of the order all actions for breach of contract brought against defendants domiciled or ordinarily resident in Scotland or Ireland. I cannot agree with that contention. It appears to me that, even if rule 2 would not apply to all, at any rate it would apply to many of the cases mentioned in the other clauses of rule 1. It might apply, for instance, to cases coming within clause (*c*), that is, cases where relief is sought against a person domiciled or ordinarily resident within the jurisdiction but who is temporarily resident out of the jurisdiction. There is nothing in clause (*e*) itself to except the case of a person who is casually and temporarily resident in Scotland or Ireland but not domiciled or ordinarily resident there. So also rule 2 might apply to cases under clause (*f*) where an injunction is sought.

The counsel for the defendant pointed out to us that the Sheriff's Court in Scotland has a very considerable jurisdiction, up to 50*l.*, in actions involving pecuniary demands, and in actions relating to land of the value of 1000*l.*, or the yearly value of 50*l.* For these reasons it appears to me that we ought to give the words of clause (*e*) their natural meaning.

It is satisfactory to know that this conclusion is in accordance with the whole history of service of writs out of the jurisdiction. Down to the time of the Common Law Procedure Act, 1852, there was no provision for service of a writ out of the jurisdiction. That defect was remedied by the 18th section of the Common Law Procedure Act, 1852, but that section, like Order XI., rule 1 (*e*) expressly excepts Scotland and Ireland from the operation of its provisions. I observe that it is stated by my brother Day in a note to the section in his work on the

Common Law Procedure Acts that this exception was introduced into the Act at the last moment, and I have no doubt that some Scotch or Irish members of Parliament, jealous of any interference with matters affecting Scotland or Ireland, caused its introduction. That state of things continued down to the passing of the Judicature Act, 1875. By that Act, Order XI., rule 1, power was given to serve a writ out of the jurisdiction in the cases mentioned in the order even upon a domiciled Scotchman or Irishman. This provision passed unnoticed, but it is notorious that after it had passed there was an outcry by the Scotch and Irish members, and Order XI., rule 1 (*a*) was framed for the protection of Scotchmen and Irishmen. That rule directed that the judge, in exercising his discretion as to granting leave to serve the writ out of the jurisdiction, should have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local court of limited jurisdiction having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England, or in the place of such defendant's residence. It was also provided that no such leave was to be granted without an affidavit stating the particulars necessary for enabling the judge to exercise his discretion in manner aforesaid, and in practice leave was not granted under that rule without an affidavit shewing that there was no such local court as mentioned in the rule, and that it was cheaper or more convenient to try the case in England. It was thought that this provision might satisfy the Scotch and Irish members, but it seems probable that pressure was brought to bear by them in order that those whom they represented might again enjoy the privilege of only being liable to be sued in their own country according to the principle "actor sequitur forum rei." It seems to me, therefore, that the result of the strict interpretation of Order XI., rule 1 (*e*), according to the natural meaning of the words, is quite consistent with what we know of the history of the legislation on the subject.

For these reasons I think that the service made in accordance with the order of Field, J., must be set aside. I may observe

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that the learned judge only made the order for the purpose of raising the question, and I am authorized by him to state that he entirely agrees with our decision.

Service set aside.

Solicitors for plaintiff: *Stibbard, Gibson & Co.*
Solicitors for defendant: *Clarke, Rawlins & Clark.*

E. L.

Dec. 10.

SHAPCOTT *v.* CHAPPELL.

County Court Action—Motion for New Trial—Improper Rejection of Evidence —Order XXXIX., r. 6—*County Courts Act*, 1875 (38 & 39 *Vict. c.* 50), *s.* 6.

Order XXXIX., rule 6, provides that a new trial shall not be granted on the ground (inter alia) of the improper rejection of evidence, unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned in the trial:—

Held, that the above rule applies to a motion in the High Court for a new trial in a county court action.

MOTION for a new trial in an action brought in the county court on the ground of the improper rejection of evidence by the county court judge. A rule nisi having been obtained,

Kemp, Q.C., and *Proudfoot*, for the plaintiff, shewed cause. They contended that Order XXXIX., rule 6, applied, that the evidence rejected would not have affected the result, and that no substantial wrong or miscarriage had been occasioned in the trial by the rejection of such evidence.

Hannen, for the defendant, supported the rule. He contended that Order XXXIX. applied only to motions for new trials in actions in the High Court and not to such motions in relation to county court actions, and that therefore Order XXXIX., rule 6, did not apply. He cited *London* v. *Roffey* (1); *Davis* v. *Godbehere* (2); *Swansea Co-operative Building Society* v. *Davies*. (3)

LORD COLERIDGE, C.J. The ground upon which this application is made is that the learned county court judge rejected

(1) 3 Q. B. D. 6. (2) 4 Ex. D. 215.
(3) Ante, p. 21.

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certain evidence that was tendered. I am of opinion that he was wrong in rejecting this evidence, but I also come to the conclusion, on consideration of all the circumstances of the case, that, if the evidence had been admitted, it ought not to have and probably would not have made any difference in the result of the trial. It is argued that we are not justified in refusing a new trial on this ground, if we think that the evidence was wrongly rejected, because the 6th rule of Order XXXIX. does not apply. No doubt the rule does not expressly mention the case of a motion for a new trial in a county court action. I agree that several of the rules of Order XXXIX. are rules that cannot have any application to proceedings in a county court case, and I admit the authority of the case of *London* v. *Roffey* (1), which appears to me to have been well decided; but I come to the conclusion that a fair and reasonable interpretation of the Orders and rules will bring the matter of county court appeals within their purview. This was an action brought in the county court, but, granting that these rules have no application to the procedure in that court, it is not now a question of such procedure but of procedure in an appeal from the county court to this court. It seems to me that, when the case comes before us on motion for a new trial, we must be guided in our procedure on such motion by the rules that are to guide and direct the procedure of this court on motions for a new trial, unless there is some reason why they should not be applicable. Rule 6 of Order XXXIX. says that we are not to grant a new trial on the ground of improper rejection of evidence where we think no substantial wrong or miscarriage of justice has been occasioned. Is there any reason why this rule should not apply to a motion for a new trial in a county court action, its terms being large enough to include such motion? It is true, perhaps, that the rule was primarily intended to apply to motions for a new trial in actions brought in the High Court of Justice, but the terms of the rule being general, and such as will apply to motions in the High Court for a new trial in county court actions, I see no reason why the rule should not apply. If it did not, motions for new trials in county court actions would be left on a different

(1) 3 Q. B. D. 6.

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footing from other motions for new trials, and would be subject to the highly technical rules that were formerly applicable to motions for new trials in the Superior Court on the ground of improper rejection or admission of evidence. This would be a most inconvenient conclusion, and one which should be avoided if possible. I think the rules do not compel us to adopt this conclusion. For these reasons I think this rule should be discharged.

STEPHEN, J. I am of the same opinion. I agree with what my Lord has said as to the effect of the evidence. It seems to me that the findings of the county court judge would have been just the same if the evidence had been admitted. With regard to the contention that the 6th rule of Order XXXIX. does not apply, I admit that there is something to be said for it, but I come to the conclusion that it is not well founded. It is true, no doubt, that several of the rules of Order XXXIX. are obviously applicable in their terms only to actions in the High Court, but, with regard to the more general rules that deal with matters involving principle, it seems to me that it would be most mischievous that such rules should be confined to actions in the High Court. There is no reason why the words of the rule relating to the rejection of evidence should not apply to motions for new trials in county court actions as well as to motions for new trials in actions in the High Court, and the same consideration applies to rule 8, which deals with stamp objections. It seems to me that, though these rules are placed with other rules which in the nature of things only apply to motions in actions in the High Court, there is no reason why their beneficial operation should be narrowed by excluding from it motions for new trials in county court actions.

MATHEW, J. I am of the same opinion. With regard to the question whether rule 6 of Order XXXIX. applies, I concur in the principle of interpretation that has been laid down by my Lord and my Brother Stephen. That principle is illustrated by the decision recently come to in cases where it was held that the order abolishing rules nisi upon motions for new trials was applicable to motions for new trials on appeal from the county court.

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In my opinion the principle of those decisions was a sound one; it seems to me that, the County Courts Act, 1875, having provided for a certain procedure in the case of motions for new trials in county court cases, obviously by analogy to the existing procedure of the Superior Court with regard to similar motions, and a rule being then made in general terms with regard to motions for new trials in pursuance of the power given by statute to alter the practice of the High Court by rules, it is reasonable to interpret such rule as applying to motions under the County Courts Act, 1875, as well as to motions for new trials in actions in the High Court. For these reasons I think the rule should be discharged.

Rule discharged.

Solicitor for plaintiff: *E. Perry Godfrey.*
Solicitors for defendant: *Funston & Hooper.*

E. L.

Dec. 10.

DINNING, APPELLANT; THE GUARDIANS OF THE SOUTH SHIELDS UNION, RESPONDENTS.

*Poor Law—Maintenance of Married Woman, Order upon Husband in respect of—*31 *&* 32 *Vict. c.* 122, *s.* 33.

A husband cannot, under 31 & 32 Vict. c. 122, s. 33, be ordered by justices to pay for the maintenance of his wife a weekly sum greater than the amount of the relief granted to her by the guardians. [By Stephen and Mathew, JJ., Lord Coleridge, C.J., dissenting.]

CASE stated by justices, the facts of which were in substance as follows:—

A complaint was preferred by the respondents against the appellant that Elizabeth Dinning, being a married woman and requiring relief without her husband, had become chargeable to the South Shields Poor Law Union, and that the appellant was her husband and liable to maintain her, and calling on him to shew cause why an order should not be made on him for a sum to be paid weekly towards the relief of his said wife.

It was proved at the hearing that the said Elizabeth Dinning was the appellant's wife, that she had become chargeable and was

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unable to maintain herself, and that the appellant had amply sufficient means to maintain her. It was further proved by the relieving officer of the respondents that the amount of relief granted by the respondents to the said Elizabeth Dinning was the sum of 3*s.* per week, and no more. The justices ordered the the appellant to pay the sum of 15*s.* weekly to the relieving officer towards the relief and maintenance of his said wife.

The question was whether such order was valid.

Bremner (*Lumley Smith, Q.C.*, with him), for the appellant. The justices cannot order payment of a greater sum than the amount of the relief given by the guardians. The justices are to order the payment of "such sum weekly or otherwise towards the cost of the relief of the wife as upon consideration of all the circumstances of the case shall appear to them to be proper." It is clear that the intention was merely that the ratepayers should be indemnified for expenses incurred.

Cock, for the respondents. The marginal note of the section is, "Order may be made in petty sessions upon a husband to maintain his wife," and he is to be summoned "to shew cause why an order should not be made upon him to maintain his wife." It might happen that the guardians had not at the time of the application fixed on any particular sum for the woman's relief.

MATHEW, J. I think that the order made by the justices was wrong, and that they had no power to determine the amount which it was proper to allow for the maintenance of the wife independently of the question what the amount of the relief actually given by the guardians might be. The section under which the order was made is the 33rd section of 31 & 32 Vict. c. 122, "An Act to make further Amendments in the Laws for the Relief of the Poor in England and Wales." That section enacts that, where a married woman requires relief without her husband, the guardians of the union or parish to which she becomes chargeable may apply to the justices, and thereupon such justices may summon such husband to appear before them "to shew cause why an order should not be made upon him to maintain his wife." The subsequent part of the section provides

that the justices on the hearing may "make an order upon him to pay such sum, weekly or otherwise, towards the cost of the relief of the wife, as, after consideration of all the circumstances of the case, shall appear to them to be proper, and shall determine in such order how and to whom the payments shall from time to time be made." I quite admit that there is room for doubt on the wording of the section whether it does not mean that the justices are to determine what sum the husband shall be ordered to pay for the maintenance of his wife, without being restricted to the amount of relief given by the guardians; but when I see that by the earlier part of the section the condition precedent to the interference of the justices is that the wife shall have become chargeable; and that the parties to institute proceedings are the guardians; and also that the sum that may be ordered to be paid is "towards the cost of the relief of the wife," it seems to me that the provisions of the section taken as a whole lead to the conclusion that the intention of the Legislature is that the amount which may be ordered to be paid shall be a sum equal to or less than the sum which the guardians have to pay for relief.

STEPHEN, J. I am of the same opinion. I must admit that the meaning of the section seems to me doubtful, and my doubt is strengthened by the fact of my Lord's differing from my opinion. The difficulty in interpreting the section seems to me to arise from the fact that the earlier part of the section which states what the husband may be summoned to shew cause does not correspond with the latter part which states what order may be made. He is to shew cause why an order should not be made upon him to maintain his wife, and one would naturally expect to find that the words providing for the order to be made would be in similar terms, but the latter part of the section does not correspond. I cannot come to the conclusion that no effect is to be given to the change of phraseology in the latter part of the section. The enactment is that an order may be made upon the husband not "to maintain his wife," but "to pay such sum, &c., towards the cost of the relief of the wife." If

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the legislature intended that the justices might order him to pay such sums for the maintenance of his wife as they thought proper, why not have said so? There must, as it seems to me, be some reason for the difference of language. I think the reason must be that it was not intended that the order should be for payment of more than the amount of the relief given. I am confirmed in this view by the consideration of some of the earlier provisions of the section. It would seem more natural, if the section were primarily intended for the benefit of the wife, that the wife should be the person to make the application, but the guardians are to apply, and therefore it would seem that they must be the parties whom the section contemplates as interested. They can only be interested to the extent of the amount expended by them in relief given to the wife. It seems to me, therefore, that the cost of the relief of the wife is to be the limit of the sum which may be ordered to be paid. I do not think that the words "as after consideration of all the circumstances of the case shall appear to them to be proper" throw much light on the meaning of the section, for they may be applied with equal facility to either construction, and the same observation seems to me to apply to the words giving power to the justices to say how and to whom the payment is to be made. There might be cases in which it would be convenient that the payment should be made to the woman direct, and others in which it might be better that it should be paid to the guardians or their officers, and by them applied to her relief. It does not seem to me possible to give any effect to the change of language in the latter part of the section, except by holding that it was intended thereby to fix a maximum limit of the amount which may be ordered to be paid, restricting it to the amount of the relief. For these reasons I think the order was wrong.

LORD COLERIDGE, C.J. I need hardly say that the fact of my learned Brothers taking a different view causes me to entertain great doubt of the soundness of the view that I take. I am very far from saying that, even if they had agreed with me, I should not have thought that the matter was a very arguable one. The

two portions of the section do not correspond. The first part says that the husband is to be summoned to shew cause why he should not be ordered to maintain his wife. The latter part says that the justices may make an order upon him "to pay such sum &c. towards the cost of the relief of the wife." The question is, what the words "towards the cost of the relief of the wife" mean upon a fair interpretation of them, having regard to the context. It appears to me that upon such interpretation they mean the same thing as the maintenance of the wife. In order to found the jurisdiction of the justices I agree that the wife must be chargeable, and also that the parties on whom she is chargeable, viz., the guardians, or their representatives must make the application; but, those conditions being satisfied, we have to see what the justices can do upon such application; and it seems to me that, if we can do so, we should so construe the section as to reconcile the two portions of it. By the first portion of the section the husband may be summoned to shew cause why he should not maintain his wife. By the interpretation put upon the section by my Brothers, though he may be called upon to shew cause against an order for the maintenance of his wife, the jurisdiction of the justices is not to make an order upon him to maintain his wife, but only an order to pay for her maintenance to the extent of the sums expended by the guardians. But when I read the whole of the section together, and find that the husband is to be called on to shew cause why he should not "maintain" his wife, that the justices are to order the payment of such sum "as after consideration of all the circumstances of the case shall appear to them to be proper," and that "they shall determine how and to whom" the payment shall be made, it seems to me that, giving effect to all these expressions, they point rather to the conclusion that the expression "cost of relief" means the same as "maintenance" of the wife, than to the conclusion that the justices are restricted to ordering payment of so much towards the sum ascertained by the guardians as the amount of relief to be given to the wife. I come, therefore, though not without hesitation, to the conclusion that the justices were right, and that their order ought to be affirmed. My Brothers being of a different opinion, however, the order must be quashed, and the

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case must be remitted to the justices that they may make an order in conformity with the view of the section taken by the majority of the Court.

Order quashed.

Solicitor for appellant: *J. S. Coleman, for J. J. Bentham.*
Solicitors for respondents: *Iliffe, Russell, Iliffe, & Cardale.*

E. L.

Dec. 14.

COLAM, APPELLANT; PAGETT, RESPONDENT.

Cruelty to Animals—12 & 13 *Vict. c.* 92, *ss.* 2, 29—17 & 18 *Vict. c.* 60, *s.* 3—"*Domestic Animals*"—*Birds trained and kept as Decoy Birds.*

Birds kept in a state of captivity and trained as decoy birds for the purpose of bird-catching are "domestic animals" within the meaning of 12 & 13 Vict. c. 92, the Act for the more effectual Prevention of Cruelty to Animals.

CASE stated by justices, the facts of which were in substance as follows:—

The appellant preferred an information against the respondent under 12 & 13 Vict. c. 92, s. 2, for cruelly illtreating, abusing, and torturing certain animals, to wit, five linnets. The justices found as a fact that the linnets were cruelly illtreated, &c., as alleged. It appeared that they had been caught by the respondent nearly twelve months before, and were used by him in bird-catching as decoy birds. They were kept by him in cages in his house when not being so used, and had been trained by him as decoy birds. The justices doubted whether the linnets were domestic animals within the meaning of the Act, and therefore dismissed the information. The question for the Court was whether the birds in question were at the time of the offence animals within the meaning of 12 & 13 Vict. c. 92.

Morton Smith (*Walton*, with him), for the appellant, contended that birds kept in captivity and trained as decoy birds were domestic animals within 12 & 13 Vict. c. 92, s. 2, as interpreted by 17 & 18 Vict. c. 60, s. 3.

The respondent did not appear.

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HUDDLESTON, B. I think the justices were wrong. The 29th section of 12 & 13 Vict. c. 92, defines "animal" as meaning "any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal." It might perhaps have been contended upon the wording of that section that the "other domestic animal" must be ejusdem generis with the animals before mentioned, and that a bird was therefore not within the Act; but it is enacted by the subsequent Act, 17 & 18 Vict. c. 60, s. 3, that the word "animal" shall in the said Act (i.e. 12 & 13 Vict. c. 92), and also in this Act, mean "any domestic animal whether of the kind or species particularly enumerated in clause 29 of the said Act, or of any other kind or species whatever, and whether a quadruped or not." That provision appears exactly applicable to this case. The question, therefore, is whether these linnets come within the term "domestic animal." Those words would include, I think, any pet bird, such as a parrot, canary, or linnet, and it seems to me that linnets kept as these were are clearly domestic animals within the provisions of the Act. The case must therefore be remitted to the justices with an intimation of our opinion to that effect.

STEPHEN, J., concurred.

Case remitted to justices.

Solicitor for appellant: *A. Leslie*, for *G. A. Charsley*.

E. L.

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STEELE *v.* THE SUTTON GAS COMPANY.

Auditor, Right of, to appoint Accountant—Companies Clauses Act, 1845 (8 *Vict. c.* 16), *s.* 108.

An auditor appointed under the Companies Clauses Act, 1845, is entitled to appoint an accountant under s. 108 of that Act, without the consent of his co-auditor.

APPEAL from the decision of a county court judge.

The action was for the sum of 15*l.* 15*s.* It appeared that the plaintiff and another had been appointed auditors of the accounts of the defendant company, whose special Act incorporated the provisions of the Companies Clauses Act, 1845 (8 Vict. c. 16). The plaintiff thought it necessary for the purposes of the audit of certain accounts of the company to have the services of an accountant, and he had accordingly employed an accountant and paid him for his services the sum which he now sought to recover from the defendants. The plaintiff's co-auditor refused to join in the appointment of the accountant. The county court judge having given judgment for the plaintiff, a rule nisi had been obtained to set aside his judgment, and for a new trial, or to enter judgment for the defendants.

Glenn shewed cause. It is submitted that the word "auditors" in s. 108 of the Companies Clauses Act, 1845, must be construed distributively. It is clearly the duty of each auditor to examine the accounts independently of the other, and it must be intended that they may make separate reports if they take different views. It is a reasonable construction that if either of the auditors should find it necessary to employ an accountant for the purpose of making a satisfactory report on the accounts he should have power to do so.

J. D. Fitzgerald supported the rule. The natural construction of the 108th section is that it gives the auditors power jointly to appoint an accountant. There is no reason why there should be only two auditors. There might, if the special Act so provided, be several auditors. It cannot have been intended that each of

several auditors should have a right to employ an accountant at the expense of the company.

HUDDLESTON, B. I think this rule must be discharged. The words of the Act may primâ facie bear the construction sought to be put upon them by the defendants' counsel, but on consideration I come to the conclusion that that construction is incorrect. By the 106th section the directors are to deliver to the auditors the half-yearly or other periodical accounts and balance-sheet fourteen days before the ordinary meeting at which the same are required to be produced, and by s. 107 it is the duty of the auditors to receive and to examine the same. By s. 108 it is provided that "it shall be lawful for the auditors to employ such accountants or other persons as they may think proper at the expense of the company, and they shall either make a special report on the said accounts or simply confirm the same." It is obvious to any one having experience of such matters that occasions occur when an auditor must exercise a separate independent judgment. One auditor may take a different view of the accounts from that of his fellow auditor. One may think that no assistance is needed; the other may be of opinion that there are items or matters which he cannot undertake to deal with without assistance from an accountant. Each auditor, as it seems to me, may make a special report if they differ; and it therefore appears to me the reasonable construction that, for the purpose of enabling him to make his report, he should be entitled to have such assistance from an accountant as he requires. For these reasons I agree with the construction of the section suggested by the plaintiff's counsel.

STEPHEN, J. I agree. It seems to me clear that the auditors may make separate reports if they think it necessary, and it seems to me naturally to follow that an auditor under the section may separately employ an accountant if he deems it necessary.

Rule discharged, and leave to appeal refused.

Solicitors for plaintiff: *Floss & Ledsam.*
Solicitor for defendants: *Tyrrell, for Merrick Head.*

E. L.

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Nov. 28.

[IN THE COURT OF APPEAL.]

DAVEY *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Negligence—Railway Company—Level Crossing—Accident caused by Plaintiff's own Negligence.

The defendants' railway crossed a public footway on the level. About half-past four o'clock in the afternoon of the 29th of March, the plaintiff, a foot-passenger, while crossing from the down side to the up side of the railway was knocked down and injured at the crossing by a train of the defendants on the up line. Owing to the position of certain buildings which stood by the line it was impossible for any one crossing from the down side to see a train coming until he got within a step or two from the down line, but a person standing on the down line or the six-foot had a clear and uninterrupted view up and down the line for several hundred yards. The plaintiff, who lived near and was well acquainted with the crossing, stated that before crossing he looked to the right along the down line, but he admitted that he did not look to the left along the up line, and that if he had looked he must have seen the train coming. The engine-driver did not whistle. There was a servant of the defendants employed as a gatekeeper at the crossing, whose duty it was to open the carriage gates there when carriages could safely be admitted, and to close them at other times. He was standing at the time on the opposite side of the crossing talking to two boys, with a furled flag in his hand; but he gave no warning to the plaintiff that a train was coming. The plaintiff having brought an action against the defendants to recover compensation for his injuries, was nonsuited on the above facts being proved at the trial:—

Held, by Brett, M.R., and Bowen, L.J. (Baggallay, L.J., dissenting), that the nonsuit was right as, although there was evidence of negligence on the part of the defendants, yet according to the undisputed facts of the case the plaintiff had shewn that the accident was solely caused by his omission to use the care which any reasonable man would have used.

Decision of the Queen's Bench Division (11 Q. B. D. 213) affirmed.

APPEAL by the plaintiff from the decision of the Queen's Bench Division discharging a rule nisi for a new trial.

The facts are fully stated in the report of the case before the Queen's Bench Division (1), and may be sufficiently gathered from the above head-note.

Kemp, Q.C., and *Cyril Dodd*, for the plaintiff.

Murphy, Q.C., and *Arbuthnot*, for the defendants.

[The following cases were cited: *Stubley* v. *London and North*

(1) 11 Q. B. D. 213.

Western Ry. Co. (1); *Stapley* v. *London, Brighton, and South Coast Ry. Co.* (2); *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (3); *Bridges* v. *North London Ry. Co.* (4); and *Cliff* v. *Midland Ry. Co.* (5)]

BRETT, M.R. In this case I have come to the conclusion that the evidence of the plaintiff himself was so clear that there was no room for any question to be asked the jury which they were entitled to answer in any but one way. If that was so, I think all the authorities shew that the judge was entitled to withdraw the case from the jury. Now, in such an action as this the burthen of proof lies entirely upon the plaintiff. There are two things for him to establish, one is affirmative and the other negative. It is for the plaintiff to shew that the accident which happened to him was caused by a negligent act of the defendants, or of those for whose negligent acts the defendants are liable, and that that accident was produced as between him and the defendants solely by the defendants' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident, because even though the defendants were guilty of negligence which contributed to the accident, yet if the plaintiff also was guilty of negligence which contributed to the accident, so that the accident was the result of the joint negligence of the plaintiff and of the defendants, then the plaintiff cannot recover, it being understood that, if the defendants' servants could by reasonable care have avoided injuring the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident. Now, here it seems to me that the plaintiff did give evidence, though not strong evidence, of negligence of the defendants, which the jury would have been justified in saying was in part at least the cause of the accident. The train was approaching a level crossing where foot passengers were in the habit of crossing, and near to that level foot crossing there were houses which, on one side at all events, until one got close to the rails,

(1) Law Rep. 1 Ex. 13.
(2) Law Rep. 1 Ex. 21.
(3) 3 App. Cas. 1155.
(4) Law Rep. 7 H. L. 213.
(5) Law Rep. 5 Q. B. 258.

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obstructed the view up and down the line, and under these circumstances I think it was the duty of the defendants to take reasonable precaution to warn foot passengers who might be about to cross, or who were crossing, of the approach of a train. A jury might say that the defendants ought to so manage the pace of their train as not to come suddenly upon persons who were crossing the rail, or that the train should have whistled. Now, there was no evidence that on the occasion when the accident happened the train was coming at an unusual or unsafe pace, but there was evidence that it did not whistle, and indeed it is admitted that it did not do so. But then comes the other part of the case which the plaintiff had to prove, namely, that he had not done anything which a reasonable man ought not to have done, and which contributed to the accident. Here the danger was on that part of the line which the plaintiff had to cross which was farthest from him when he commenced crossing, and if, at the moment after he had passed the house and garden, he had looked to the left, he could have seen some 300 or 400 yards clear up the line. It was broad daylight, and he himself admitted that if he had looked to the left up the line he must have seen the train coming. If he had looked and seen the train coming in the position it must have been in on this occasion at that time, it seems to me impossible for any reasonable person to say otherwise than that he ought not to have crossed then. Therefore, if he had looked he ought not to have crossed. Then should he have crossed without looking? He looked, as he says, to the right, which was where he would see any train which was coming on the line he had first to cross, but without looking to the left, he crossed all the space from the corner of the garden to the first set of rails, he then crossed this first set of rails, and then the six foot space, so that he must have walked about fifteen feet before he came to the set of rails where the accident occurred, and then, without looking, he walked on that last set, so that he was, as he stated, between the buffers before he saw the train. Now if he was not misled into not looking, it seems to me that the plaintiff himself shewed, by uncontradicted evidence, that he had omitted to do what any reasonable man would have done, and had therefore been guilty of negligence. Therefore it seems

to me to be clear that without the assistance of the jury one must come to the conclusion that the plaintiff, according to his own shewing, was guilty of a want of reasonable care, which was one of the causes of the accident. Then it is said that he was misled. It is not enough, I think, for the plaintiff to say he was misled, but he must go further, and shew that reasonable persons of ordinary care would have been misled under the same circumstances. What he says misled him was this. He saw the railway gateman there, and he did not signal to him; but he had no right to suppose that such gateman was there for the purpose of giving a signal to foot-passengers; therefore why should his not giving a signal, that is to say, why should his not doing that which it was no part of his duty to do, have misled the plaintiff? There was no evidence that this railway man was put there for the purpose of signalling to or of warning foot-passengers, or that he ever did so. He was put there to warn carriages and carts, and to shut and open the gates, so as to prevent their crossing the railway when they ought not, and to enable them to so cross when they might; in other words, to perform the statutable duty of the railway company. The plaintiff, therefore, I think had no right to say he had been misled by that railway man not having made any signal to him. On the contrary, it seems to me that the plaintiff shewed by his own uncontradicted evidence that he himself had been guilty of negligence which contributed to the accident. Under these circumstances, the learned judge at the trial was in my opinion justified in not leaving the case to the jury.

BAGGALLAY, L.J. I have the misfortune to differ from the other members of the Court. Now the accident happened on the 29th of March, 1882, at about half-past four o'clock in the afternoon, when the plaintiff, who was crossing over a level crossing from one side of the defendants' railway to the other, came in contact with some part of the train and sustained an injury, the cause of which he charges to the negligence of the defendants. The learned judge at the trial nonsuited the plaintiff, and the ground on which he did so was that the undisputed facts shewed that the plaintiff's own negligence was the sole cause of the

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accident, and that there was no evidence proper to be submitted to the jury of negligence on the part of the defendants. Now, I think there was evidence to go to the jury of negligence of the defendants. There was a level crossing, and I think it was one which may be said to be a dangerous crossing, by reason of the houses which were on each side, within a very few feet of the railway itself. There was, therefore, a duty on the part of the defendants to use reasonable precautions to prevent injury to foot-passengers as well as to carriages and horses while crossing. Then it was admitted that the train by which the accident was caused approached the level crossing without whistling, and I think that that was a matter for the jury in considering whether there had been negligence on the part of the defendants. But the more important question is whether there was under the circumstances of the case that which should be treated as contributory negligence on the part of the plaintiff. I must confess that it appears to me that the judgment of Lord Cairns in the *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (1) affords a guide to arriving at a proper conclusion in this case. He says (page 1166), "If a railway train which ought to whistle when passing through a station were to pass through without whistling and a man were in broad daylight and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man and not the carelessness of the company, which caused his death." Then, after stating that that was a case which was very slightly different from the case then under the consideration of the House of Lords, he was of opinion that the difference was sufficient to induce him to hold, as he did with the majority of the other Lords, that the case actually before the House was properly left to the jury. Now the facts of that case were these: "The night was perfectly clear, the line of railway at the Lansdown Road Station was a straight line for several hundred yards. The advancing express train was perfectly lighted. So long as the deceased was standing behind the stationary train he probably could not see up the line to his left hand, but as soon as he

(1) 3 App. Cas. 1155.

passed from behind the train on to the six-foot way, he could see up the line for several hundred yards. If therefore, on coming to the six-foot way he had looked up the line to his left, he must have seen the express train." In the present case it would appear that directly the corner of the garden was passed there was the four-foot and the down line, which was another four-foot and a half or five feet, and therefore nine feet, before the six-foot way could be reached, and therefore for something like nine feet more than in the case in the House of Lords, if the party had looked, and in that direction, he could have seen the train. Now in the first place, if a man is walking at a fair pace it is not very easy to stop short in a step or two. If the plaintiff had first seen the train the moment he had got upon the down line, he might have stopped himself within ten feet of the nearer rail of the up line; but it would require that a man should pull himself up very quickly indeed to stop himself after seeing the train. But in addition to that, there was the absence of whistling or of anything to give him any indication of an approaching train, and, moreover, there was the gateman of the company standing in a position in which he could see the up-train coming, and having a little red flag under his arm, and talking to one or two persons, and I think that that was a circumstance which should have been taken into consideration by the jury to enable them to come to the conclusion whether there was or not that amount of carelessness which the law recognises as contributory negligence so as to entitle the defendants to a verdict. It is not for me to say how I think upon the evidence the findings should have been, but I must confess that the feeling in my mind is that there was no contributory negligence on the part of the plaintiff, but at the same time not going so far as to say that there was no evidence of it for the jury. On these grounds I am unable to assent to the view of this case which the Master of the Rolls has taken, and which I believe my Brother Bowen also takes; but, differing as I do from them, I am bound to say that I do so with hesitation.

BOWEN, L.J. I have come to the conclusion with the Master of the Rolls that the ruling of the learned judge at the trial was

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correct, and that the Divisional Court were right in upholding the nonsuit. It seems to me to be important to draw the line clearly between the functions of the judge and the functions of the jury. It is not because facts are admitted that it is therefore for the judge to say what the decision upon them should be. If the facts which are admitted are capable of two equally possible views, which reasonable people may take, and one of them is more consistent with the case for one party than for the other, it is the duty of the judge to let the jury decide between such conflicting views.

Now, coming to the question of this particular case, the first point is whether there was any evidence of negligence in the conduct of the defendants, and the second point is whether there was any evidence of negligence in the conduct of the defendants, which, to use the express language of Lord Cairns, led to the accident, or whether there is evidence of incuria dans locum injuriæ. Now if the case simply rested on the first point, whether there was evidence of any negligence in the conduct of the defendants, I confess I should be of opinion that it could not be properly withdrawn from the jury. There is no statute law as regards the obligations of a railway company with respect to a level foot-crossing, so far as I know, and the learned counsel for the appellant admitted as much. It seems to me that whether a railway company has or has not taken the proper precautions with regard to the speed at which and the warning accompanied by which their trains pass on a level crossing, must be in each case a question of fact. A level crossing in a prairie, where you can see twenty or thirty miles each side, is very different from a level crossing outside the mouth of a tunnel, or a level crossing in a street, and you must look at each case, and all the facts of the case, before you make up your mind what the railway company ought to do. In the present case, looking at the buildings which stand on each side this line, and their proximity to the crossing, I am not prepared to say that if the case had stood there a jury might not reasonably have thought the defendants should have done something more than they did, but the case does not stand there, because the plaintiff had to make out that there has been some default or neglect on the part of the defendants

which was the causa causans of the accident. Now the plaintiff himself has told his own story. He was a man who knew this part of the line perfectly, and he lived within a short distance from it. He knew, therefore, that when the line was perfectly clear the carriage gates might be opened, and he knew also for what purpose the railway servant was at the gates, which was beyond all question to keep the gates closed when the train was approaching, and to open them for carriages when the line was clear. It was broad daylight, and as soon as he had entered the wicket gate—had he been a sensible man he would have looked up and down the line to see if there was a train coming either way. A train was, in fact, so close to him that he was only able to cross fifteen feet before he found himself between its buffers, and yet he never took the trouble to look and see if the train was coming. Now is it open to any reasonable mind to draw the inference that that accident was caused by anything except the gross negligence of the man who never looked at a train which was within a few feet of him? It has been argued for the plaintiff that even if in this respect the plaintiff was negligent, still he might have been misled into doing what he did, but, as the Master of the Rolls pointed out, the question is not whether he was misled, but whether he was reasonably misled, whether it was possible for a reasonable man to have done what he did. Now what was there to have misled any reasonable person? Is there in other words any evidence from which the jury would have a right to consider that the plaintiff, taking his own story to have been true, ought to have been misled? There was the railway man opposite, whose business was not to warn foot-passengers, but only to open the gates and shut them for carriages. He had his flag furled, and he was talking to a boy. If, indeed, it had been the duty of the man to unfurl his flag and to warn foot-passengers when the train was coming, then I think that his conduct would have been something to have misled the plaintiff, but his duty was to do nothing of the sort, and I cannot see why the fact that he was talking to a boy should lead the plaintiff to suppose that a train was not coming. The account which the plaintiff has given himself of his conduct does not leave it open, I think, for a reasonable man to come to any but one

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conclusion, namely, that this accident was caused directly by the plaintiff himself and his own negligence. I wish to say that in *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (1), the question for the House of Lords was whether the learned judge at the trial should have nonsuited or not, and that question divided itself into two parts, first, whether there was evidence of negligence in the railway company to go to the jury; and, secondly, whether, even assuming there was such, that was negligence which could have caused the accident, or whether there was not such clear contributory negligence on the part of the plaintiff as rendered it impossible for a reasonable person to suppose the accident was caused by anybody except the plaintiff himself. Now the observations of Lord Cairns in that case, it will be observed, arise solely on this second branch. Lord Cairns thought that on the admitted facts it could not be said that there were not two views open of the plaintiff's conduct, and the reason he thought so was because the plaintiff was a person who was simply crossing in the night time a station where the trains ought to whistle when they were passing such crossing in the night time, and on the ground that the facts there did admit of two reasonable views, Lord Cairns thought that the judge ought not to have nonsuited. If the facts here had been exactly as they were in that case, one would have come to the same conclusion in the present case, but it is because I think they do not fall within the facts of that case, but on the contrary do not leave open two views which can be reasonably taken of the plaintiff's conduct, that I think the judge was right in nonsuiting, and the judgment of the Court below was right, and ought to be affirmed.

Appeal dismissed.

Solicitor for plaintiff: *J. P. Godfrey.*
Solicitors for defendants: *Bircham & Co.*

(1) 3 App. Cas. 1155.

W. P.

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Nov. 20.

Copyright—Infringement—Right of representing Dramatic Piece or Entertainment—Performance of Play in Private Room—Admission without Payment—3 & 4 *Wm.* 4, *c.* 15, *s.* 2; 5 & 6 *Vict. c.* 45, *s.* 20.

The defendant and others joined in representing a dramatic piece in the board room of a hospital, without the consent of the proprietor of the copyright in the drama. The performance was merely for the entertainment of the nurses, attendants, and others connected with the hospital, who were admitted free of charge:—

Held, that the room where the drama was represented was not a place of public entertainment, and that the defendant was consequently not liable to damages or penalties under the Copyright Acts, 3 & 4 Wm. 4, c. 15, ss. 1, 2, and 5 & 6 Vict. c. 45, s. 20.

Semble, that the right of representing a dramatic piece and of taking proceedings for the infringement of such right is governed by the Act 3 & 4 Wm. 4, c. 15, and is not affected by the later Act, 5 & 6 Vict. c. 45.

Quære, whether it is essential, in order to make the room where a play is represented a place of dramatic or public entertainment within 3 & 4 Wm. 4, c. 15, ss. 1, 2, that a charge should be made for admission to it.

MOTION by way of appeal from the decision of the judge of the Southwark County Court.

It appeared that the action was for damages, or, in the alternative, for penalties of 40*s.* each, under the Copyright Acts, 3 & 4 Wm. 4, c. 15, ss. 1, 2, and 5 & 6 Vict. c. 45, s. 20.

The plaintiff was assignee of the copyright in a dramatic piece called 'Our Boys,' and the defendant was member of an amateur dramatic club, which in January, 1883, gave three representations of that piece at Guy's Hospital, for the entertainment of the nurses, attendants, and others connected with the hospital. The admission was free, and the expenses of the seats and costumes were defrayed by the governors of the hospital. A general invitation was conveyed to the nurses, attendants, and others connected with the hospital through the sisters who superintend that institution, and tickets were also issued to the physicians, surgeons, and senior students of the hospital, but on the last occasion a lesser number of such tickets was so given, and in lieu thereof tickets were given to the members of the amateur club to distribute among their friends.

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On each occasion there were about 170 persons present. Tickets were sent to the editors of five theatrical newspapers in order to obtain notices of the performance, but only one reporter came, on one occasion.

The learned judge, upon the authority of *Russell* v. *Smith* (1), and *Wall* v. *Taylor* (2), was of opinion that the performance was at a place which was for the time being a place of dramatic entertainment within 3 & 4 Wm. 4, c. 15, ss. 1, 2, although no payment was taken, but that it was not a public representation of a dramatic piece so as to infringe the right of the proprietor of the right of representing the play in public. On this ground he gave judgment for the defendant.

Lumley Smith, Q.C. (*W. G. Smythies*, with him), for the defendant. Assuming that the expression "place of dramatic entertainment" in 3 & 4 Wm. 4, c. 15, ss. 1, 2, must, since *Russell* v. *Smith* (1), be taken to mean a place of public entertainment, which it is not necessary should ordinarily be used for dramatic purposes; it is contended that in the present case there was no public representation of the play so as to make the defendant liable. The Act 5 & 6 Vict. c. 45, merely extends the rights conferred by 3 & 4 Wm. 4, c. 15, to musical compositions. No case can be found where proceedings were successfully taken in respect of a performance where no charge was made for admission. In *Russell* v. *Smith* (1), where a copyright song was performed by the defendant at Crosby Hall, a place licensed for music and dancing, the defendant was held liable, but there the public were admitted and money was taken at the doors. In *Wall* v. *Taylor* (3), where it was held that the right of performing a musical composition conferred by 5 & 6 Vict. c. 45, ss. 20, 21, extended to its performance at any place of public entertainment, Cave, J., after referring to the Acts 3 & 4 Wm. 4, c. 15, and 5 & 6 Vict. c. 45, says that the right of representing a dramatic piece which they confer appears to be the right of representing it in public. The plaintiff may possibly rely upon some expressions of Brett, M.R., when the case came before the

(1) 12 Q. B. 217. (2) 9 Q. B. D. 727.
(3) 9 Q. B. D. 727, at p. 731.

Court of Appeal (1), to the effect that the right given by 5 & 6 Vict. c. 45, was not merely to recover penalties where the performance was at "a place of dramatic entertainment," but extended to cases where the performance was for the amusement of other persons. But these expressions went further than the decision required, and are not a binding exposition of the Acts. Taken in their literal sense, they would apply to a song sung in a private drawing-room, and there is nothing in the judgments of the other Lords Justices to support them.

S. H. Leonard, for the plaintiff. The play was performed by the defendant under circumstances which made him liable to the penalties imposed by 3 & 4 Wm. 4, c. 15, s. 2, or at any rate under 5 & 6 Vict. c. 45, by which the right of representing a dramatic piece is not limited to the representation being at a place of dramatic entertainment. The performance was for the entertainment of a number of persons admitted by ticket, and the fact that no charge was made for admission is immaterial, for the test of an infringement of dramatic copyright is the injury to the proprietor. The county court judge has found that the performance was at a place of public entertainment, and the only fact which can be relied on by the defendant is that there was no profit from the entertainment. In *Novello* v. *Ludlow* (2) an action was held to lie for the infringement of the copyright in a musical composition where copies had been lithographed for the private use of a musical society which performed gratuitously, and not for the purpose of sale or exportation. The present case is widely different from that of private theatricals for the amusement of friends, and ought to be considered by analogy to literary copyright, where it would be unnecessary to shew that the defendant gained money by the infringement.

LORD COLERIDGE, C.J. I am of opinion that the county court judge was right. The case is important from the fact that at the present day a large number of theatrical performances are given by amateurs, not for gain to themselves but in aid of some charitable or public object in which they are interested. It might no doubt be a serious injury to the owner of the copyright

(1) 11 Q. B. D. 102, at p. 106. (2) 12 C. B. 177.

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in a dramatic piece if it were frequently represented in London and the provinces by amateurs who receive money for their performances, though not for their own benefit, and so far attract the public as to prevent them from visiting the regular and recognised places of public entertainment. The plaintiff was therefore justified in taking the opinion of the Court upon the point of law, though I could wish that some other occasion had been selected. My judgment depends upon the bearing of the two Acts, 3 & 4 Wm. 4, c. 15, and 5 & 6 Vict. c. 45, upon each other, and is given with more hesitation than if it had depended upon the construction of the earlier statute only. I think that such a performance as this is not within the purview of 3 & 4 Wm. 4, c. 15, and if the case stood only upon that Act I think it clear that the respondent ought to succeed. With regard to the second statute, I am not quite sure that I have ascertained the meaning of its provisions, and if they were intended to make the penal clauses of the earlier Act more stringent with regard to the same subject-matter, my judgment may to that extent be doubtful. But upon the best consideration I can give to the matter, I think the case turns really upon the earlier statute, for the later one—5 & 6 Vict. c. 45—deals with literary copyright; and by s. 20 it is enacted that its provisions with regard to literary copyright are extended to the subjects provided for by 3 & 4 Wm. 4, c. 15, which is in its terms expressly confined to dramatic copyright. But I cannot see that the Act 5 & 6 Vict. is read into or incorporated with the Act 3 & 4 Wm. 4, nor do I see that the judgment of the Court of Appeal in *Wall* v. *Taylor* (1) dealt with that question. What was considered in *Wall* v. *Taylor* (1) was whether the penal clauses of the earlier Act were incorporated in the later one: a very different question from the present. The Court did not hold that the later statute is so far incorporated with the former one as to alter its terms, and it does not appear to me to have this effect. What, then, is the true interpretation of the earlier Act, and especially having regard to the decision in *Russell* v. *Smith*. (2) Sect. 1 enacts that every author of a play, opera, farce, or other piece, shall have as his own property the sole liberty of representing, or causing to be represented, at any

(1) 11 Q. B. D. 102, at p. 106. (2) 12 Q. B. 217.

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place or places of dramatic entertainment, &c., any such production—and in order to ascertain what a "place of dramatic entertainment" is we must consider the words of s. 2 also. This section imposes upon any one who shall, contrary to the right of the author or his assignees, represent or cause to be represented without his consent, at any place of dramatic entertainment, any such production—the penalty of 40*s.*, or the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages. It seems to me that to put the benefit which a man derives from contravening the right of or the injury which he inflicts upon the owner as the equivalent of the penalty of 40*s.*, shews that it is only such a representation as that in *Russell* v. *Smith* (1) that it was intended to protect, or, in other words, that the right given in s. 1 is not infringed by any representation to which the penalty or damages referred to in s. 2 are not applicable, so that if there be any representation which does not give benefit or advantage to the person representing, or inflict any injury upon the person whose right is supposed to be so contravened, this is not within 3 & 4 Wm. 4. *Russell* v. *Smith* (1) was a decision upon this statute. There the copyright was in a song, but the Court held that it was a dramatic piece or entertainment within the meaning of the Act. The representation was at a large public hall in London, open to all who could pay for admission, and for the profit of the person representing it, and the Court in their judgment put as a test of a representation within the Act, whether it was dramatic, in public, and for profit; and I do not think, considering the care with which this case was considered, that it can be said that these expressions were not essential to the judgment. Now I am aware that there are obiter dicta of the present Master of the Rolls which go very far beyond the definition of "a place of dramatic entertainment" proposed in *Russell* v. *Smith*. (1) The Master of the Rolls, in *Wall* v. *Taylor* (2), certainly does say, as I understand him, that performing a dramatic piece for the amusement of other persons makes the place where it is performed a place of dramatic entertainment, which would include the case of a song sung for the amusement

(1) 12 Q. B. 217. (2) 11 Q. B. D. 106.

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of friends in a drawing-room. The Master of the Rolls, whom I have consulted during the argument, thinks that some of his expressions went further than he is now disposed to go, but if his words are taken in their full sense it will follow that this piece was performed under circumstances which bring it within the earlier statute. I have already stated my reasons for taking the opposite view, and I think *Russell* v. *Smith* (1) is a sufficient authority to support my opinion. If the complaint were that at some place of dramatic entertainment, either a regularly licensed theatre, or a place obviously intended for public entertainment or for profit, there had been a dramatic performance of a copyright work without the licence of the author or his assignee, my decision might be different. My decision is based upon the facts of this particular case.

I will only add that the learned county court judge has not found as a fact that this was a place of dramatic entertainment. He has found as a fact that the play was performed in a place of dramatic entertainment if this were necessary. But he has so found in submission, as he thinks, to the cases cited before him. In this opinion I think he was wrong, and I gather from the case that if he had understood the law differently he would not have decided as he did upon the facts.

STEPHEN, J. I am of the same opinion, and it seems to me that the case is an important one. The Act 3 & 4 Wm. 4, c. 15, enacts for the first time that the authors of any play or dramatic piece shall have the sole liberty of representing it at any place of dramatic entertainment, and s. 2 enacts that if any person shall during the continuance of such sole liberty, without the consent of the author, represent such piece at any place of dramatic entertainment he shall be liable for each and every such representation to the penalty of 40*s.*, or to the full amount of the benefit arising from such representation, or the loss sustained therefrom, whichever shall be the greater damages.

The question is whether this penalty has been incurred on the present occasion? My Lord has fully discussed *Russell* v. *Smith* (1), which is an authority upon the interpretation of the Act,

(1) 12 Q. B. 217.

and I do not wish to refer to it at length. It appears to decide that the public representation of any play in a room to which the public are admitted upon payment makes the room a place of dramatic entertainment. I do not bind myself to the statement that profit is absolutely and under all circumstances whatever a necessary element in the publicity of such a representation. I think it an important fact that the county court judge has found that there was here no public representation, and I am disposed to entirely agree with him. If therefore the case had to be considered for the first time, I should say that this case was not an infringement of the Act because all the elements of publicity were wanting—there being no profit, no general admission of the public, and the place being merely the board room of the hospital, which is not in the ordinary sense of the word a place of dramatic entertainment. But I wish to be cautious in stating what I think to be the tests of an infringement. I can imagine cases which I should be very sorry to say were not within the Act, although I do not say they are. One of them I mentioned during the argument. Suppose while a copyright play was being performed at one theatre, another theatre were to perform the same play for the purpose of damaging the author, and were to be thrown open gratuitously to any person who would come to see the performance. I am far from saying that such a case would not be within the Act. I think that the injury which would be done to the person who has the sole liberty of representation at a place of dramatic entertainment is an important consideration—perhaps the leading consideration. And this being my opinion as to the construction to be put upon 3 & 4 Wm. 4, s. 15, what is to be said as to the effect of 5 & 6 Vict. c. 45, upon it? This Act, which is well known as Serjeant Talfourd's Act, introduced great changes in the law of copyright. Sect. 20 extended the term of the copyright of a dramatic piece to forty-two years, but it does not appear to me to have in any degree altered the nature of the right conferred by 3 & 4 Wm. 4. I think that the liberty given by the first Act is the liberty of representing at places of dramatic entertainment as interpreted by *Russell* v. *Smith* (1). I cannot see that the Act 5 & 6 Vict. c. 45, had any other effect

(1) 12 Q. B. 217.

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material to the present question, so that the case substantially stands upon the interpretation of the earlier statute. Then comes the case of *Wall* v. *Taylor* (1). I think that when that case is carefully looked at, it will be found that it applies entirely to musical compositions. The Master of the Rolls says that it must be remembered that the copyright of musical compositions was given for the first time by the Act of 5 & 6 Vict. c. 45. This Act says with regard to musical compositions, that the liberty granted by the first Act is to be extended to musical compositions. The interpretation put upon that provision by the Master of the Rolls is, that the words relating to the place of dramatic entertainment do not apply to musical compositions. If this view amounts to an express decision upon the point, we should be bound by it as an authority. But, so far as I can see, it does not apply to this case at all. No doubt the Master of the Rolls goes on to use language with reference to musical compositions which would have the extraordinary consequences which have been adverted to—that any one who sung a copyright song in his own drawing-room for the entertainment of his guests would be guilty of an infringement of the copyright of the author of the song, and liable to penalties. So far as mischief to the author is concerned, it is difficult to imagine anything more mischievous to authors than that a copyright song should be prevented from being sung in a drawing-room. The effect would be that it would never become known at all. So that I should be very unwilling to agree in that view. It appears that the Master of the Rolls had not sufficiently considered the language which has been referred to. In my view this case should be decided irrespectively of the Act 5 & 6 Vict. c. 45, s. 20.

I do not think that I need add anything to what has been said by my Lord with regard to the view taken by the county court judge of the facts.

Judgment for the defendant.

Leave to appeal granted.

Solicitor for plaintiff: *B. C. Cowan*, for *J. A. Tucker, Bath.*
Solicitors for defendant: *Burgess & Cosens.*

(1) 11 Q. B. D. 102, at p. 106.

A. P. S.

MURPHY *v.* COFFIN & CO.

1883
Dec. 13.

Ship—Charterparty—Demurrage—Completion of Voyage—Charterer's Option to order Ship to one of several Places in Dock—Discharge of Cargo.

By the terms of a charterparty the ship was to load from the charterer's agents at Cardiff a cargo of coals, "and therewith proceed to Dieppe and deliver the same alongside consignee's or railway wharf, or into lighters, or any vessel or wharf where she may safely deliver, as ordered, cargo to be loaded and discharged in forty-eight running hours, &c. Demurrage over and above the said lying time at 10*s.* per hour." The ship arrived in the dock at Dieppe, and was ordered to discharge at the railway wharf, but in consequence of all the discharging berths being occupied, she was not berthed at the railway wharf until twenty-four hours after her arrival in the dock. In an action by shipowner against charterers for demurrage:—

Held, that the voyage was not completed, and the lying time did not commence under the charterparty until the ship was berthed at the railway wharf, and therefore that the defendants were not liable to pay demurrage for delay in respect of the period which elapsed between the ship's arrival in the dock at Dieppe and her being berthed at the railway wharf.

Davies v. *McVeagh* (4 Ex. D. 265) considered.

In an action for demurrage of the plaintiff's steamship, tried in the county court of Glamorganshire, holden at Cardiff, the judge gave judgment for the defendants, subject to a case for the opinion of the Queen's Bench Division, which stated the following material facts:—

By a charterparty, dated the 23rd of June, 1880, the defendants chartered the plaintiff's steamship *Foyle* to proceed to East Dock, Cardiff, and there load from the factors of the charterers a full and complete cargo of coal, and being so loaded, to proceed to Dieppe "and deliver the same alongside consignee's or railway wharf, or into lighters, or any vessel or wharf where she may safely deliver, as ordered," on being paid freight at the rate of 6*s.* 6*d.* per ton; the cargo to be taken from alongside free of expense and risk to the ship; cargo to be loaded and discharged in forty-eight running hours, time not to count from Saturdays 5 P.M. to Mondays 7 A.M. (Sundays, holidays, strikes, accidents, &c., and all causes of what nature and kind soever beyond the personal control of the charterers, which may delay the loading

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or unloading of the steamer always being excepted), from the time of being ready to load and unload as customary. Time for loading not to commence between the hours of 6 P.M. and 6 A.M. Demurrage over and above the lying time at 10*s.* per hour.

The *Foyle* arrived in the dock at Dieppe about 5 P.M. on Thursday, July 1, and was ordered by the charterers to discharge at the railway wharf. There were only five berths for discharging steamships alongside the railway wharf, and none of them were vacant from the time of the ship's arrival in the dock until 7.30 on Friday the 2nd of July, when the ship was allowed by the dock authorities to get into a discharging berth alongside the railway wharf. She was finally discharged by the charterers' agents at Dieppe at 4.30 P.M. on Monday, the 5th of July.

The plaintiff claimed demurrage on the assumption that the lay days began to run under the charterparty at 5 P.M. on the 1st of July, when the ship arrived in the dock at Dieppe.

The defendants contended that the lay days did not begin to run until 7.30 P.M. on the 2nd of July, when the ship got alongside a quay berth at the railway wharf.

The county court judge held that by the terms of the charterparty the ship did not complete her voyage until her arrival alongside the railway wharf, and that the lay days began to run from the time of such arrival, and therefore that no demurrage was payable.

The question for the opinion of the Queen's Bench Division was whether such judgment was right in law.

F. J. Church, for the plaintiff. The ship had completed her voyage when she arrived in the dock at Dieppe, and the lay days then commenced to run. In Lord Blackburn's judgment in *Dahl* v. *Nelson* (1) it is said: "If the charterparty had left it free to the merchant to select a dock, it may well be that he was bound to select one into which admittance could be procured. *Ogden* v. *Graham* (2) is an authority in favour of that position." Here the charterers have an option to select one of several places of discharge, and they were bound to select one in which the

(1) Law Rep. 6 App. Cas. at p. 44. (2) 1 B. & S. 773.

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discharge could be effected without delaying the ship. The ship could have been discharged into lighters on her arrival in the dock. James, L.J., in *Nelson* v. *Dahl* (1), states his opinion that "there is a marked and broad distinction between the port of discharge, the usual public place of discharge in that port, which it is the shipowner's business at all events, and at his own risk, to reach, and the private quay, wharf, or warehouse adjoining or near the port, on which or in which he is to co-operate with the merchant in the delivery of the cargo."

[MATHEW, J. In the present case the charterparty is a special contract by the shipowner to get into one of six different places. The alternative is not "or as near thereto as she can safely get," as in *Nelson* v. *Dahl* (2).]

In *Ashcroft* v. *Crow Orchard Colliery Co.* (3) the ship was to load a cargo of coals at specified docks, and by the dock rules no coal agent was to be allowed to have more than three vessels loading at one time, and the vessels were to load at the cranes. The ship having been delayed in consequence of the number of ships in the port having priority to load in the dock, the charterers were held liable.

[MATHEW, J. There the contract was to load with the usual dispatch of the port.]

Here it is to discharge within forty-eight hours, and it is submitted that the question is substantially the same. If the charterer makes it impossible for the ship to perform her contract, he is liable to demurrage by way of damages.

[DAY, J. The charterers here have committed no wrong entitling the shipowner to damages; they have only exercised their option under the charterparty.]

The judgment of Bramwell, L.J., in *Davies* v. *McVeagh* (4) is directly in point in the plaintiffs' favour.

Horne Payne, for the defendants. The judgment in *Davies* v. *McVeagh* (4) is inconsistent with a series of authorities from *Parker* v. *Winlow* (5) down to the present time, and it is also

(1) 12 Ch. D. at pp. 603, 604.
(2) 12 Ch. D. 568.
(3) Law Rep. 9 Q. B. 540.
(4) 4 Ex. D. 265.
(5) 7 E. & B. 942.

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inconsistent with the judgment of the House of Lords in *Dahl* v. *Nelson*. (1)

[He was stopped.]

MATHEW, J. It is the ordinary and reasonable rule that the lay days under a charterparty do not begin to run until the vessel has arrived at her place of destination. The charterparty here seems to have been framed in the hope of avoiding the questions which have arisen in numerous cases as to the respective rights and liabilities of shipowner, charterers, and consignees with respect to the discharge of cargo where the place of destination is a dock. The vessel is to load, proceed to Dieppe, and deliver her cargo "alongside consignees' or railway wharf, or into lighters, or any vessel or wharf where she may safely deliver, as ordered." The place of destination is, therefore, such one of these places as the charterers may order. When the vessel arrived in the dock at Dieppe she was ordered to discharge at the railway wharf, which was then occupied by other vessels, so that there was no berth vacant for her, and it was not until she obtained one that she was in a position to discharge her cargo.

With all respect to the learned judges who decided *Davies* v. *McVeagh* (2), I think that case is inconsistent with all the decisions which were referred to by the defendants' counsel in argument in this case. It is to be observed that the attention of the Court in *Davies* v. *McVeagh* (2) does not appear to have been called to the fact that under the charterparty the High Level Dock was the place of destination. On the contrary, it seems to have been assumed that the Wellington Dock was the place of destination. In the case of *Strahan* v. *Gabriel* (3), mentioned in the judgment of Brett, L.J., in *Nelson* v. *Dahl* (4), the facts were the same as in the present case, with the single exception that the charterparty did not give an option to the charterer with respect to the place of destination. The distinction that here an option is given to the charterer does not, in my view, prevent that case from covering this in principle.

(1) Law Rep. 6 App. 38.
(2) 4 Ex. D. 265.
(3) Not reported.
(4) 12 Ch. D. at pp. 589, 590.

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I am of opinion that the railway wharf was the only place of destination under this charterparty; that the lay days did not begin to run until the vessel had secured a berth there, and therefore that our judgment should be for the defendants.

DAY, J. I am of the same opinion, and for the same reasons.

Judgment for the defendants.

Solicitors for plaintiff: *Ingledew, Ince, & Vachell.*

Solicitors for defendants: *Gregory, Rowcliffe, & Co., for Downing, Cardiff.*

W. A.

CARTER *v.* DRYSDALE AND OTHERS.

Nov. 30.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 7—*Notice of Injury—Defect or inaccuracy in Notice—Omission of Date of Injury.*

Sect. 4 of the Employers' Liability Act, 1880, provides that an action to recover compensation under the Act shall not be maintainable unless notice of injury is given as provided by the Act. By s. 7, the notice shall state (inter alia) the date of the injury; and "a notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein" unless the judge who tries the action shall be of opinion that the defendant is prejudiced in his defence by such defect or inaccuracy, and that it was for the purpose of misleading. A notice of injury given under s. 4 omitted to state the date of the injury, and the judge at the trial found that the defendant was not prejudiced in his defence by the omission, and that it was not for the purpose of misleading:—

Held, that the omission of the date was a "defect or inaccuracy" in the notice within the meaning of s. 7, and therefore did not render the notice invalid.

MOTION by way of appeal from a decision of the judge of the Marylebone County Court.

Action under the Employers' Liability Act, 1880, to recover compensation for personal injury.

The plaintiff's notice of injury given under s. 4 of the Employers' Liability Act, 1880, omitted to state the date of the injury as required by s. 7. (1) The notice was sent by the plaintiff's solicitor

(1) By s. 4: "An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced

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to the defendants by post, and with the notice was sent a letter from him to them, in which the date of the injury was stated. The notice of injury did not refer to the letter. At the trial the judge found as facts that the defendants were not prejudiced in their defence by reason of the omission, and that it was not done for the purpose of misleading, but he held, on the authority of *Keen* v. *Millwall Dock Co.* (1), that the notice was bad, and he therefore nonsuited the plaintiff. The plaintiff having obtained a rule to set aside the nonsuit on the ground that the notice was sufficient under the Employers' Liability Act, 1880;—

R. Burleigh Muir, for the defendants, shewed cause. The nonsuit was right. The terms of s. 7 of the Employers' Liability Act, 1880, are express that the notice "shall" state the date at which the injury was sustained. The legislature intended that performance of all the requirements of s. 7 should be a condition precedent to the right to maintain an action: *Keen* v. *Millwall Dock Co.* (1) The last clause of s. 7 refers to other defects or inaccuracies in the notice than those previously specified.

A. P. Poley, for the plaintiff, was not heard.

LORD COLERIDGE, C.J. It is to be remembered that the Employers' Liability Act, 1880, imposes a heavy liability upon employers, and with respect to notice specifies conditions which are to be precedent to the workman's right of action. Sect. 4 provides in strongly negative terms that an action for compensation under the Act "*shall not be maintainable* unless notice that

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within six months from the occurrence of the accident causing the injury, or in case of death within twelve months from the time of death."

By s. 7: "Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or if there be more than one employer upon one of such employers."

"A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein unless the judge who tries the action arising from the injury mentioned in the notice shall be of the opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

(1) 8 Q. B. D. 482.

injury has been sustained is given within six weeks from the occurrence of the accident," and s. 7 provides that this notice "*shall*" state the cause of the injury and the date at which it was sustained. In *Keen* v. *Millwall Dock Co.* (1) all the judges concurred in saying that, whether or not the notice of injury could refer to another document, it must be seen that all the requisites of s. 7 were complied with. But I am of opinion that the terms of the clause at the end of s. 7 are wide enough to cover this case. The notice "shall not be deemed invalid by reason of any defect or inaccuracy therein" unless the judge who tries the action shall be of opinion that the defendant is prejudiced in his defence by such defect or inaccuracy, and that the defect or inacuracy was for the purpose of misleading. In this case it is found as a fact that the defendant was not so prejudiced, and that the defect or inaccuracy was not misleading, and I do not see how the judge could come to any other conclusion, because in a contemporaneous document sent to the defendants the date of the injury was stated. I think it is sufficiently clear, upon a reasonable construction of the Act, that the omission of the date was a defect or inaccuracy in the notice within the meaning of s. 7, and I am therefore of opinion that the notice was not thereby rendered invalid, and that the decision of the county court judge was wrong.

MATHEW, J. I am of the same opinion. If the contention for the defendants were right, s. 7 would manifestly be a snare for unwary people bringing an action under the Employers' Liability Act. There seems to be a clear indication in that section that, whereas the effect of defects or inaccuracies in the notice would otherwise be to render it invalid, that effect is to be limited by the operation of the last clause in the section to cases in which the judge is of opinion that the defect or inaccuracy prejudices the defendant in his defence, and is for the purpose of misleading.

Rule absolute.

Solicitor for plaintiff: *J. Davies.*
Solicitors for defendants: *Le Riche & Sons.*

(1) 8 Q. B. D. 482.

1883
Nov. 5.

BRADBURY *v.* COOPER.

Practice—Particulars—Defamation—Slander—Particulars of Persons to whom Slander was uttered.

A statement of claim alleged that T., "at the request and by the direction of the defendant, falsely and maliciously spoke and published of and concerning the plaintiff" certain slanderous words, which were set out:—

Held, that the defendant was entitled to particulars of the persons to whom the words were uttered.

Motion by way of appeal from an order of Day, J., at chambers.

In an action for libel and slander the statement of claim alleged (inter alia) that on the 17th of May and the 26th of June, 1881, one C. Timson, "at the request and by the direction of the defendant," falsely and maliciously spoke and published of the plaintiff, and in relation to his business, certain slanderous words which were set out; and that on the 21st of June, 1882, and the 22nd of March, 1883, C. Timson, at the request and by the direction of the defendant, falsely and maliciously spoke and published of the plaintiff, and in relation to his business, other slanderous words, which were also set out, "to a certain customer of the plaintiff in the way of his business."

Day, J., affirmed the order of a master that the plaintiff should deliver to the defendant particulars of the persons to whom the slanders alleged in the statement of claim were uttered.

The plaintiff appealed.

J. W. Jones, for the plaintiff. This case is within the principle of *Eade* v. *Jacobs*. (1) The defendant is attempting to get particulars of the evidence which the plaintiff proposes to adduce at the trial.

[He also cited *Benbow* v. *Low*. (2)]

Houghton, for the defendant. The decision in *Eade* v. *Jacobs* (1) was not intended to apply to actions of slander, where the

(1) 3 Ex. D. 335. (2) 13 Ch. D. 553.

publication to others is an essential part of the cause of action. The practice has always been to allow these particulars.

[He also referred to *Attorney General* v. *Gaskill.* (1)]

GROVE, J. In this case if the slanders complained of had been alleged to have been uttered by the defendant himself I should have had much doubt whether he could compel the plaintiff to give the particulars asked for. I am not satisfied that the modern practice has been to order particulars of the names of the persons to whom the slanders were uttered. Where the defendant is alleged to have uttered them himself he may be supposed to know to whom he did utter them. In old days it was no doubt the rule that where the plaintiff claimed special damage by reason of the slander having been uttered to particular persons, he must give the names of those persons. However I give no opinion upon the question which would arise if the defendant was accused of having uttered the words himself. But the present is a different and an unusual case. The words are said to have been uttered by Timson "at the request and by the direction of the defendant," and particulars are asked of the persons to whom Timson uttered them. The defendant cannot tell where or under what circumstances Timson uttered the words, and may therefore come to trial in entire ignorance of the persons to whom they were uttered, and unprepared to meet the case made against him. He might not be able to call Timson, and could not meet the plaintiff's claim for damages—whether general or special—without knowing to whom Timson was alleged to have uttered the slanders complained of. This case, therefore, is unlike any cited before us in argument. I am of opinion that the defendant is entitled to the particulars he asks for, and that the order of the judge at chambers should be affirmed.

SMITH, J. This is certainly a peculiar case. The plaintiff does not allege that the defendant himself slandered him, but says that the defendant delegated to another to utter the slanderous words. Some of those words are alleged to have been uttered in 1881—the action having been brought in 1883. Under

(1) 20 Ch. D. 519.

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these circumstances the defendant asks for particulars of the persons to whom Timson is alleged to have uttered the words. He seeks in effect to know the case against which he has to defend himself at the trial. Apart from authority I should think the defendant's demand a very reasonable one. No authority has been cited with respect to particulars which governs the present case. In *Wingard* v. *Cox* (1) Denman, J., refused to order the plaintiff to give particulars of the names of persons mentioned in the statement of claim who were passing in the street when the alleged slander was uttered. There the defendant was asking for particulars of the plaintiff's damages, and I should have been surprised if those particulars had been ordered. Cases were cited by the defendant's counsel in which it had been sought by administering interrogatories to obtain the names of persons who could be called as witnesses at the trial. In one of these—*Eade* v. *Jacobs* (2)—Lord Justice Cotton stated the rule as to discovery. He said: "Looking at the practice formerly existing in the Court of Chancery, I think that the plaintiff is entitled to a discovery of the facts upon which the defendant relies to establish his case, but not of the evidence which it is proposed to adduce." It seems to me that in the present case—peculiar as it is—the particulars which the defendant requires are particulars of facts upon which the plaintiff relies, and not of the evidence he proposes to adduce. I am therefore of opinion that the particulars ought to be given, and that the order was rightly made.

Motion dismissed.

Solicitor for plaintiff: *S. B. Somerville, for T. Phillips, Llandovery.*

Solicitor for defendant: *Chamberlayne.*

(1) W. N. 1874, p. 106.

(2) 3 Ex. D. 335.

W. A.

HARRIS, APPELLANT; MAY, RESPONDENT. 1883 *Nov.* 27.

Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 25—*Written Warranty—Contract to supply Milk each Day for Six Months, whether a Warranty within the Act.*

By s. 25 of the Sale of Food and Drugs Act, 1875, "if the defendant, in any prosecution under this Act, prove to the satisfaction of the justices that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect," he shall, under certain other specified conditions, be entitled to be discharged from the prosecution. Upon the hearing of an information against the appellant for having, contrary to the provisions of the Act, sold, on the 12th of April, 1883, certain milk to the respondent, which was not of the nature, substance, and quality demanded by him, as it contained a percentage of water, the appellant proved that he had purchased the article in question under a written contract made with F., on the 24th of March, 1883, whereby F. agreed to sell to the appellant eighty-six gallons of good and pure milk (each and every day) for six months, the said milk to be delivered twice daily":—

Held, that this contract did not constitute a written warranty within the meaning of s. 25 in respect of the specific article sold by the appellant to the respondent on the 12th of April; and therefore that the appellant was not entitled to be discharged from the prosecution.

CASE stated by justices for the city and county of Bristol under 42 & 43 Vict. c. 49, and 20 & 21 Vict. c. 43.

The following were the material facts:—

An information was laid against the appellant for an offence under s. 6 of the Sale of Food and Drugs Act, 1875. (1) It was proved that on the 12th of April, 1883, the respondent bought as milk from the appellant, who was selling milk from cans in a street in Bristol, one and a half pints of fluid, which upon an analysis duly obtained under the provisions of the Act was found to consist of milk and 10 per cent. of added water.

The appellant proved that the fluid had been supplied to him

(1) Sect. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l*."

By s. 20 proceedings for recovery of penalties imposed for offences under the Act may be taken before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner.

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under a written contract, dated the 24th of March, 1883, and made between J. L. Fry of the one part, and the appellant of the other part, whereby Fry agreed to sell to the appellant "eighty-six imperial gallons of new and pure milk (each and every day) for six months commencing the 25th of March and ending the 28th of September, 1883, at the price of 7½*d.* per imperial gallon; the said milk to be delivered twice daily at, &c."

The appellant relied upon this contract as being a written warranty that the article in question was the same in nature, substance, and quality as that demanded of him by the respondent, within the meaning of s. 25 of the Sale of Food and Drugs Act, 1875 (1), and the appellant proved to the satisfaction of the justices that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it.

The justices were of opinion that the appellant's contract with Fry did not constitute a written warranty within the meaning of s. 25, and they convicted the appellant, and imposed a fine.

The question for the opinion of the Court was whether the contract of the 24th of March, 1883, was a written warranty within the meaning of the Sale of Food and Drugs Act, 1875. If it was such a warranty the conviction was to be quashed.

Poole, for the appellant. The contract was a warranty within the meaning of the Act; it is a contract to supply new and pure milk each day during the period for which it is in force. The warranty therefore is that the milk supplied on the particular day in question should be new and pure. An action for a breach of warranty would lie upon that contract. The statute is a penal one, and must receive a strict construction in favour of the person sought to be convicted of an offence under it.

(1) Sect. 25: "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance and quality as that demanded of him by the prosecutor, and with a written warranty to that effect; that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor unless he shall have given due notice to him that he will rely on the above defence."

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B. Coleridge, for the respondent, was not heard.

LORD COLERIDGE, C.J. I entertain no doubt on this matter. I am of opinion that the contract relied on by the appellant is not a written warranty within the meaning of the Act. It is true that an action for breach of warranty could be brought upon that contract. But the Court has to construe an Act of Parliament framed for the preservation of the public health. It is in one sense no doubt a penal Act. The object of the legislature was to render it difficult to defraud the public or injure them by selling adulterated articles. The Act therefore provides that no person shall sell to the prejudice of the purchaser any article of food, or any drug, which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty, but the person offending against that section is relieved from the penalty if he can prove that he purchased the article in question as the same in nature, substance, and quality as that demanded of him by the purchaser, and with a written warranty to that effect. It seems clear that the legislature meant that a person seeking to protect himself against the penalty, and wishing to make himself perfectly safe in respect of the sale of a specific article, must shew that he had a proper specific warranty in writing in respect of that article from his vendor. The appellant here has not shewn that. It is possible that he may have had a parol statement, amounting to a warranty, from his vendor each morning that the milk was supplied, but that would not be sufficient to comply with the requirements of the Act. I think the decision of the justices was right.

MATHEW, J. I am of the same opinion.

Judgment for the respondent.

Solicitor for appellant: *J. H. Clifton, Bristol.*

Solicitor for respondent: *H. M. Phillips, for T. H. Gore, Bristol.*

W. A.

1883
Dec. 9.

HANSEN *v.* MADDOX.
YEO, CLAIMANT.

Practice—Interpleader—Rules of 1883, *Order LIV. r.* 12 (6)—*Order LVII. rr.* 5, 9, 10, 15—*Order barring Claimant—Power of Master to award Costs —Costs of Defendant in Action as distinct from those in Interpleader Proceedings—Judicature Act*, 1873, *s.* 49.

Under the Rules of 1883, Order LIV. rule 12 (i), limiting the power of the Master to award costs other than those of any proceeding before him or those specially authorized—the Master in making an order barring the claimant upon an interpleader summons under Order LVII., when the applicant is a defendant, has no power under rule 15 to make it a term of the order that the plaintiff shall pay the costs of the defendant in the original action, apart from those in the interpleader proceedings, and an order to this effect is, notwithstanding 36 & 37 Vict. c. 66, s. 49, subject to appeal.

APPEAL from an order of Field, J., refusing to vary an order of the Master in Chambers.

It appeared that the action was brought to recover 25*l.*, the deposit paid to the defendant, an auctioneer, in respect of property purchased by the plaintiff from a Mrs. Gilchrist. One Yeo, who asserted that he was executor of Mrs. Gilchrist, claimed the money, and an interpleader summons having been taken out under the Rules of 1883, Order LVII. r. 5, the claimant relinquished his claim. The Master thereupon made the order appealed from—"that the claimant be barred and that defendant do pay plaintiff 25*l.*, he deducting therefrom his costs to be taxed."

Rose-Innes, for the plaintiff. The Master had no jurisdiction to order that the costs of the action as distinct from those of the interpleader proceedings, should be paid by the plaintiff. Under Order LIV. r. 12 (i) (1), he has no power to award costs except those of any proceedings before him.

(1) Rules of the Supreme Court, 1883:—

Order LIV. rule 12. In the Queen's Bench Division a Master may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Acts or the Rules may be transacted or exercised by a judge at Chambers, except in respect of the following matters:—

(i.) Awarding of costs, other than

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J. C. Lawrance, Q.C., for the defendant. First, under Order LVII. r. 15, by which the Court or a judge may in or for the purposes of any interpleader proceedings make all such orders as to costs and all other matters as may be just and reasonable—the Master had power to award these costs: *Searle* v. *Matthews* (1)

[DAY, J. There an issue had been directed. This is a final order barring the claimant.]

Secondly, there is no appeal from the order. By Order LVII. r. 7, the decision of the judge in a summary way under rule 8 is final and conclusive, and under rule 15 the judge, whose deputy the Master is, has power to make all such orders as to costs as may be just and reasonable. Thirdly, the costs being in the Master's discretion, there is under s. 49 of the Judicature Act, 1873, no appeal from his order.

Rose-Innes, in reply. Rule 15 only applies where an interpleader issue has been disposed of upon the merits, and not to a mere interlocutory order. The Master has only jurisdiction over the costs of the issue tried before him, and not over the costs of the previous action. Rule 15 is practically a re-enactment of the provisions as to costs in s. 14 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), which has never been held to confer such a power as this.

DAY, J. I am of opinion that the order of the Master so far as

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the costs of or relating to any proceeding before a master, and other than any costs which by these rules, or by the order of the Court or a judge, he is authorized to award.

Order LVII., Interpleader, rule 7. The Court or a judge may order that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant.

Rule 9: Where the question is a question of law, and the facts are not in dispute, the Court or a judge may decide the question without directing the trial of an issue.

Rule 15: The Court or a judge may in or for the purposes of any interpleader proceedings make all such orders as to costs and all other matters as may be just and reasonable.

36 & 37 Vict. c. 66, s. 49: No order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to an appeal except by leave of the Court or judge making such order.

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(1) W. N. Nov. 1883, 176.

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it is appealed from was wrong. The action is brought to recover 25*l.*, the deposit upon property purchased by the plaintiff. This money was claimed by one Yeo, as executor of the vendor; but upon an interpleader summons being taken out he abandons his claim and the usual order is made declaring him barred against the defendant. The plaintiff is therefore primâ facie entitled to recover the amount for which he brings his action and his costs, including the costs of the interpleader proceedings; but the Master orders that he shall only recover subject to his paying the costs of the defendant. I think this order unjust, and I am glad to think that there is nothing in s. 49 of the Judicature Act, 1873, to prevent it being appealed from. I express no opinion as to whether the Master can be deemed to be a judge within the meaning of this section; but it seems clear that under Order LVII., rule 15, the Master has exceeded his jurisdiction, as he has no power to deal with the costs of the preceding action, but only those of the interpleader proceedings. Whether there would be an appeal from his order if it had been confined to the interpleader proceedings, it is unnecessary to say.

SMITH, J. I am of the same opinion. The defendant took out an interpleader summons, and the claimant appeared and abandoned his claim. The plaintiff was thereupon entitled to recover, and the claimant, if any one, ought to have paid the costs. The Master, however, orders that the costs of the defendant shall be paid by the plaintiff. I think this order was clearly wrong. Then it is argued that under rules 8 and 11 of Order LVII., the decision of the master in an interpleader proceeding is final and conclusive. But I think these rules only apply where the Master is asked to try the issue, so that as there was here no hearing it cannot be said there was no appeal. Another point which has been taken is that under s. 49 of the Judicature Act, 1873, this was an order as to costs in the discretion of the Master, from which there is no appeal. If the Master had limited his order to the costs of the interpleader proceedings, I should say that there was no appeal, but in dealing with the costs of the action as distinct from those proceedings he made an order as to costs over which he had no jurisdiction. By Order LIV., rule 12, of the New

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Rules the Master can only award the costs of or relating to any proceeding before him or costs which he is expressly authorized by the rules to award, and rule 15 of Order LVII. only gives jurisdiction over the costs of the interpleader proceedings and not over those of the action.

Order rescinded.

Solicitor for plaintiff: *Stollard.*

Solicitors for defendant: *Dod & Longstaffe.*

A. P. S.

BURSTALL *v.* BRYANT.

Dec. 13.

Practice—Interpleader—Trial by Jury—Application for New Trial—Court of Appeal.

Under the Rules of 1883, Order LVII., rule 11, where an interpleader issue has been tried by a jury, and judgment given according to their finding by the presiding judge, application for a new trial must be made to the Court of Appeal and not to the Divisional Court.

INTERPLEADER issue tried before Pollock, B., and a jury, who, under the direction of the learned judge, found in favour of the defendant. The learned judge thereupon gave judgment for the defendant, but gave the plaintiff special leave to apply for a new trial under Order LVII., rule 11 (1).

R. O. B. Lane applied accordingly for a new trial on the ground of misdirection.

[LORD COLERIDGE, C.J. Ought not this application to be made to the Court of Appeal instead of to this Court.]

By Order XXXIX., every motion for a new trial in any cause or matter where there has been a trial of any issue thereon by a jury shall be made to the Divisional Court of the Queen's Bench

(1) Rules of 1883, Order LVII., Interpleader, rule 11. "Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, shall be final and conclusive against the claimants, and all persons claiming under them, unless by special leave of the Court or judge, as the case may be, or of the Court of Appeal."

Rule 13 "The Court or judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for.

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Division, where there has been a trial without a jury by appeal to the Court of Appeal. These words are general and govern the practice in the present case. Rule 13 of Order LVII., which enacts that the judge who tries an interpleader issue may finally dispose of the whole matter of the interpleader proceedings, does not make the verdict of the jury a judgment by the judge without a jury. Under the old practice, before this rule, where an interpleader issue was tried before a jury a motion for a new trial was made to the superior Court and from thence to the Exchequer Chamber: *Withers* v. *Parker* (1).

[LORD COLERIDGE, C.J. Under the old practice, the judge at the trial only gave an interlocutory judgment, which was afterwards settled at chambers. Now it is unnecessary to go to chambers, and the presiding judge gives final judgment.]

The final judgment is of the same description as that given in the trial of an ordinary action.

Gore (*Finlay, Q.C.* with him), for the defendant, was not heard.

LORD COLERIDGE, C.J. The judgment in the present case is in truth a judgment by the presiding judge, from which there is no appeal unless he grants leave, and then by Order LVII. rule 11, the appeal is to the Court of Appeal and not to this Court.

STEPHEN, J., concurred.

Motion rejected.

Solicitors for plaintiff: *Parker, Garrett, & Parker.*
Solicitors for defendant: *Bompas, Bischoff, & Dodgson.*

NOTE.—In *Parnell* v. *Stedman*, where on the same day the same point arose, the Court gave a similar decision.

(1) 4 H. & N. 810; 28 L. J. (Ex.) 383.

A. P. S.

HODGES *v.* THE LONDON TRAMS OMNIBUS COMPANY.

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Dec. 7.

Metropolitan Stage-Carriage, Licence to use—Manager—Injunction—2 & 3 Wm. 4, c. 120—32 & 33 Vict. c. 115, and Rules thereunder.

The plaintiff as manager of an omnibus company became, under the provisions of the statutes and rules for the regulation of metropolitan stage-carriages, the licensee of their vehicles. Having ceased to be such manager :—

Held, that he was entitled to an injunction to restrain the company from continuing to use his name upon the number plates affixed to their carriages.

THIS was an appeal from the refusal of Field, J., in chambers, to restrain the defendants, the London Trams Omnibus Company, from continuing to use the name of the plaintiff as proprietor or licensee on their stage-carriages and from continuing to use stage carriages licensed in his name.

The licensing of stage-carriages was formerly provided for by, amongst other statutes, 2 & 3 Wm. 4, c. 120, the 6th section of which enacted that "it should not be lawful for any person to keep, use, or employ any stage-carriage, unless such person should have a licence in force so to do granted to him under the authority of that Act by two or more of the commissioners of stamps or by some person duly authorized by the said commissioners to grant such licences, nor unless there should be fixed on such carriage in manner thereinafter [s. 26] mentioned the numbered plates by that Act directed to be delivered with every such licence, nor unless the several particulars by that Act directed to be painted on every such carriage should be painted thereon."

By s. 13 the licences were to be renewed yearly.

By s. 14 it was enacted that "when any person to whom any licence shall have been granted under this Act for or in respect of any stage-carriage shall determine to discontinue or give up such licence, such person shall give notice in writing of such his determination to the commissioners of stamps or to the officer by whom such licence was granted; and, when the time for giving up such licence according to such notice shall have elapsed and

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such licence shall have been given up to the said commissioners or officer, such licence shall cease and determine and shall be no longer in force, and the person so previously licensed shall not be charged with the duties payable according to the terms of such licence in respect of such stage-carriage for any period subsequent to the expiration of such notice and the re-delivery of such licence, provided he shall within seven days next after the expiration of such notice deliver up to the said commissioners or officer the numbered plates mentioned in such licence."

By ss. 15 and 17, in default of delivery up of the plates, the duty was to continue payable by the person named in the licence. By that statute also various penalties for offences were imposed upon the licensee.

By 32 & 33 Vict. c. 14, s. 39, all the above sections of 2 & 3 Wm. 4, c. 120, except s. 6, were repealed, save as mentioned in the 16th and 17th sections of the Act. The 17th section of which provides that on the 1st of January, 1870, the following (among other duties) shall cease to be payable, viz., hackney carriage licences and duties in London, and stage carriage licences and duties in Great Britain.

By s. 6 of 32 & 33 Vict c. 115, hackney and stage-carriage licences are to be granted by one of Her Majesty's principal secretaries of state (or by the commissioner of the metropolitan police, if so directed by him, s. 11): and any licence under that section "may be granted at such price, on such conditions, be in such form, be subject to revision or suspension in such events, and generally be dealt with in such manner, as the said secretary of state may by order prescribe, subject as follows,—(1.) that a hackney or stage-carriage licence shall, if not revoked or suspended, be in force for one year, and there shall be paid in respect thereof to the receiver of the metropolitan police such sum, not exceeding 2*l.* 2*s.*, as the said secretary may prescribe: (2.) that in any such order provision shall be made for the transfer of a hackney or stage-carriage licence to the widow or to any child of full age of any person to whom a licence has been granted who may die during the continuance of such licence leaving a widow or child of full age, and also for the transfer of

a hackney or stage-carriage licence to the husband of any woman to whom such licence has been granted and who marries during the continuance thereof."

And s. 15 enacts that "all the provisions of the Acts relating to hackney carriages and metropolitan stage-carriages in force at the time of the commencement of this Act (the 1st of January, 1870) shall, subject to any alteration made therein by this Act or by any order or regulation of the said secretary of state made in pursuance of this Act, continue in force, and all such provisions of the said Acts as relate to licences granted under those Acts or any of them shall, subject to any alteration as aforesaid, apply to licences granted under this Act."

By rule 7 of an order made by a secretary of state under this Act, dated the 10th of March, 1871, the applicant for a licence is to bring the carriage to which he desires that the licence shall attach to the police-station of the district, for examination by the inspector of public carriages, and shall at the same time deliver to the inspector the application and receipt for the duty (2*l.*); and the inspector, *if he find such carriage fit for public use*, shall cause a metal plate bearing the number which is to distinguish such carriage, called the number plate, to be affixed thereto in his presence, and shall sign a certificate of its fitness and the number of passengers it is constructed to carry.

Rule 11 provides that "an application for a licence on behalf of any co-partnership or company shall be made by and such licence shall be issued to the senior partner, or to the secretary or manager of the company, as the case may be: and the person to whom a licence shall be so issued shall be responsible for the observance of the conditions under which the licence is granted, and shall be liable to all penalties for breaches of such conditions as if he were the person solely interested in the licence."

Rule 13 contains a provision for the change of address of the person licensed: and rule 14 provides that, "in case of the death of any proprietor during the currency of his licence, the licence may be brought to the office of the commissioner, and the commissioner may by indorsement thereon transfer the licence to the personal representatives of the deceased proprietor or to his

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widow or child, if such child is of full age. In like manner, in case of the marriage of a female proprietor during the currency of her licence, her licence may be transferred to her husband."

The defendant company were possessed of ten stage-carriages the licences for which were granted to the plaintiff as their manager in August, 1883. Having ceased to be manager, the plaintiff was desirous of surrendering the licences, and tendered them to the commissioner for that purpose: but, inasmuch as he was unable to comply with s. 14 of 2 & 3 Wm. 4, c. 120, by delivering up the numbered plates which were affixed to the defendants' vehicles, and there is no provision either in the Acts of parliament or the rules of March, 1871, for the transfer of the licences to the new manager, the commissioner refused to accept such surrender.

H. Terrell (with him *T. Terrell*), for the plaintiff. The only way in which the plaintiff can relieve himself from responsibility for any penalties which he might have incurred through the negligence or the misconduct of the company or their servants during the currency of the licences, either under the statute or the rules, is, by restraining them by injunction from continuing his name as licensee or proprietor on their number plates. In *Routh* v. *Webster* (1) the provisional directors of a joint-stock company having without the authority of the plaintiff published a prospectus stating him to be a trustee of the company, the Master of the Rolls (Lord Langdale) granted an injunction to restrain them from continuing to use his name in connection with the company, on the ground that he was exposed to some risk by the unauthorized act of the company in so using his name.

[MATHEW, J. There was no contract in that case between the complainant and the company.]

Neither is there here, save the implied contract to permit his name to be used as licensee so long as he continues to be manager of the company. Why should he be compelled when he has left their employ to remain liable for all penalties which the company may incur for the next six or seven months?

(1) 10 Beav. 561.

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[MATHEW, J. The plaintiff may be entitled to be indemnified.]

It may be that the company is insolvent: and it is suggested that that is so.

[LORD COLERIDGE, C.J. Is there any provision in any of the Acts for the surrender of licences before the expiration of the year for which they are granted?]

Sect. 14 of 2 & 3 Wm. 4, c. 120, expressly provides for the surrender of licences upon the delivery by the licensee of the numbered plates. This section is repealed by 32 & 33 Vict. c. 14, s. 29, but s. 15 of 32 & 33 Vict. c. 115, expressly provides that all provisions of the Acts relating to metropolitan stage carriages in force at the time of the commencement of the Act shall subject to any alteration made by the Act or by any order or regulation of the Secretary of State continue in force.

Barnard, contrà. The difficulty the company are placed in is this:—If they are compelled to apply for fresh licences and new number plates, it will be necessary for them to send each of their vehicles to Scotland Yard for inspection and to get the new plates affixed to them. This would very materially interfere with the business of the company. The granting an injunction is a matter purely in the discretion of the Court; and they will not accede to the application where so great an injury will necessarily be done to the company, and where the possibility of loss or damage to the plaintiff is so infinitesimal and so distant.

LORD COLERIDGE, C.J. It may be very inconvenient to the company to go through the ceremony of inspection and getting these vehicles supplied with fresh number plates. But I do not see that that is any answer to the plaintiff's claim for relief. We must leave the company to settle the matter with the commissioner. Why should the plaintiff continue to incur the serious responsibility which the Act of parliament and the rules of March, 1871, cast upon a licensee of a stage-carriage, until the expiration of the currency of the licences? It is suggested that the defendants may indemnify the plaintiff; but peradventure the company may be insolvent. I think the plaintiff is entitled to an injunc-

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tion with costs; but the order is not to be enforced for a reasonable time,—say, a fortnight, or a month,—to enable the company to obtain fresh licences.

STEPHEN, J., and MATHEW, J., concurred.

By consent the appeal motion was treated as a motion for judgment.

Judgment acordingly, with costs.

Solicitor for plaintiff: *Charles A. Russ.*
Solicitor for defendants: *Wyatt & Barraud.*

J. S.

Nov. 14.

WILKINS *v.* DAY.

Nuisance—Obstruction on a Highway.

The defendant farmed land on either side of a highway. His servants removed a roller from one of his fields across the highway to the gate of the opposite field, and, taking away the horses, left the roller on the green-sward at the roadside with its shafts turned up (but projecting a few inches over the metalled part of the road), intending it to remain there until it should suit their convenience to draw it away. The plaintiff's wife drove past the spot, and her pony shied at the roller, overturned the carriage, and caused her death.

In an action under Lord Campbell's Act (9 & 10 Vict. c. 90), the jury found that the accident was caused by an unreasonable user by the defendant of the highway:—

Held, that the verdict was warranted by the evidence, and that the plaintiff was entitled to judgment.

ACTION under Lord Campbell's Act (9 & 10 Vict. c. 90), s. 1, for the wrongful and negligent user by the defendant of a public highway, whereby the wife of the plaintiff, who was lawfully using the highway with a pony and carriage, was killed.

The cause was tried before the Lord Chief Justice at the last summer assizes at Bristol. The facts were as follows:—The defendant was the occupier of land on both sides of a public highway the centre of which to the extent of about fourteen feet was metalled, the remainder consisting of a strip of greensward on either side. He was also possessed of a large agricultural roller which his servants had been using on one of his fields, and which they had drawn across the road towards the gate of the opposite

field, removing the horses and leaving the roller on the greensward until it should suit their convenience to draw it into the field. The roller remained thus for several hours, with its shafts turned up, and projecting six or seven inches over the metalled portion of the highway. Whilst the roller so remained, the wife of the plaintiff drove past the spot, when the pony shied at the roller, overturned the vehicle, and killed her. The accident happened at about two o'clock in the day; and there was evidence that other horses had been frightened by the roller earlier in the day; but it was not shewn that the defendant was aware of this. The defendant called no witnesses.

It was contended on the part of the plaintiff that the placing and leaving the roller upon the highway was not a justifiable or reasonable user of it, but constituted a nuisance, and therefore that the action was maintainable.

His Lordship left it to the jury to say whether the placing the roller where it was and leaving it there was a reasonable user of an undoubted highway.

The jury found that it was not, and gave a verdict for the plaintiff, damages 100*l.*

Nov. 14, 1883. *Charles, Q.C.* (*C. Mathews*, with him), moved to enter judgment for the plaintiff for 100*l.* and costs. It is clearly settled that the "highway" consists of the whole space from hedge to hedge, whether metalled or not; and that any unauthorized user of any part of it to the annoyance of the Queen's subjects is an indictable offence, and actionable if it results in private or particular damage: *Rex* v. *Cross* (1); *Rex* v. *Jones* (2); *Harris* v. *Mobbs.* (3) In *Rex* v. *Cross* (1) the defendant had for years been in the habit of plying for passengers with his stage-coaches in the public streets near Charing-Cross; and Lord Ellenborough said, "The king's highway is not to be used as a stable-yard. It is immaterial how long the practice may have prevailed; for, no length of time will legitimate a nuisance." And in *Rex* v. *Jones* (2), upon an indictment for depositing, hewing, and sawing logs of timber in a public street, the defendant's counsel instanced the case of draymen delivering hogsheads of

(1) 3 Camp. 224. (2) 3 Camp. 230. (3) 3 Ex. D. 268.

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beer from their drays into the cellar of a publican,—an operation which sometimes occupies a considerable space of time. But Lord Ellenborough said: "If an unreasonable time be occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway; but this must be done with promptness. The rule of law upon this subject is much neglected, and great advantage would arise from a strict and steady application of it. The defendant is not to eke out the inconvenience of his own premises by taking in the public highway into his timber-yard." In *Reg.* v. *United Kingdom Electric Telegraph Co.* (1) it was held that placing telegraph posts on the greensward at the side of a highway so as to obstruct the right of passage which the public have over the whole space between the fences, is an indictable nuisance. *Harris* v. *Mobbs* (2), which was also the case of an action under Lord Campbell's Act, very closely resembles the present case. There, a house-van attached to a steam-plough was placed by the defendant early in the afternoon on the greensward at the side of, but four or five feet from, the metalled part of a highway. The engine had been taken away, but the van and plough were left for the night. Between seven and eight in the evening, the plaintiff's testator drove his mare and cart along the metalled part of the road, when the mare shied at the obstruction, got her leg over the shaft of the cart, and kicked the driver on the knee, from the consequences of which kick he died. It was argued there that, though the standing of the van and plough where they did might constitute an obstruction so that, if the driver of the vehicle, wishing to use that part of the highway, had been obstructed and injured, an action might lie, yet, as there had been no obstruction in fact, and no more danger caused by the van and plough than would have been occasioned by the same objects passing along the highway drawn by horse-power, as they lawfully might have been, the action was not maintainable: but Denman, J., ruled that, "if there be an act done upon any part of the highway which is not a reasonable user of it, and which has the effect of endangering its use to others, and damage results from such act in the course of

(1) 31 L. J. (M.C.) 166. (2) 3 Ex. D. 268.

a lawful user of the highway, an action will lie for such damage;" and there was a verdict and judgment for the plaintiff. So here, the verdict was clearly warranted by the evidence, and the plaintiff is entitled to judgment. The defendant was not using the highway as a highway, but merely as a place of temporary deposit for his roller. This was not a fair or reasonable user of the highway.

Bucknill, in support of the rule. The question for the jury undoubtedly was whether under all the circumstances there was an unreasonable user by the defendant of a substantial part of the highway. The defendant's roller was drawn as near to the gate of his field as it could be, only overlapping the metalled part of the highway by a few inches. It must be conceded that strictly speaking the greensward is part of the highway: but it was an unused part of it.

[MATHEW, J. It was a question of reasonableness of the user, and therefore a question for the jury.

GROVE, J. If the accident had happened whilst the roller was being moved across from the one field to the other, the defendant might not have been liable: but the placing and leaving it where it was left seems to have been an unusual and unnecessary thing.]

Many of the elements of the decision in the case of *Harris* v. *Mobbs* (1) are absent here.

GROVE, J. I am of opinion that the plaintiff in this case is entitled to judgment. *Rex* v. *Cross* (2), *Rex* v. *Jones* (3), and *Harris* v. *Mobbs* (1) are distinct authorities to shew that all the Queen's subjects are entitled to the free and unobstructed use of the highway, and that an action will lie for an injury resulting from "an occupation of a part of the highway amounting to an obstruction and prevention of its free user by the public to an extent which is unreasonable." Here was unquestionably a legal nuisance, and an undoubted injury resulting from that legal nuisance. How can we say that that is not actionable? If the accident had happened whilst the person in charge of the roller

(1) 3 Ex. D. 268. (2) 3 Camp. 224.
(3) 3 Camp. 230.

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was opening the gate for the purpose of passing with it into the field, it might have been said that he was fairly and reasonably using the highway. But that was not so. The roller was left standing on a portion of the highway, because it was more convenient to leave it there until the harrowing in the field was done. The defendant was not using the highway for any lawful purpose: he was making it a standing ground for his machine to suit his own purposes. The accident seems to me to have been occasioned by an unauthorized obstruction of that which was a part of the highway, and which obstruction made the highway less safe for user by the public. It must always be a question of degree. There was no misdirection. In substance it was left to the jury to say whether the user of the highway by the defendant was reasonable or not. They found that it was unreasonable: and I think that their verdict was legally sustained by the evidence. There was no conflict of testimony. The obstruction was clearly unlawful and wholly unnecessary.

MATHEW, J. There is abundance of authority to shew that whether or not there has been an unreasonable obstruction of a highway or of a navigable river, and whether the injury complained of has resulted therefrom, are questions for the jury. And, unless the jury in this case can be said to have come to an absolutely unreasonable conclusion, the verdict must stand.

Judgment for the plaintiff.

Solicitors for plaintiff: *Darby & Cumberland, for Clifton & Carter, Bristol.*

Solicitors for defendant: *Rowcliffes & Co., for Green & Carpenter, Bristol.*

J. S.

THE QUEEN *v.* THE JUDGE OF THE CITY OF LONDON COURT. 1883 *Dec.* 10.

County Court—Admiralty Jurisdiction—City of London Court—Claim in relation to the carriage of Goods in any Ship—Passengers' Luggage—County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 *Vict.* c. 51), s. 2.

Passengers' luggage carried on board a ship is not "goods" within the meaning of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and consequently the Act does not confer jurisdiction to try a claim arising out of the loss of such luggage on a county court having Admiralty jurisdiction.

THIS was a rule obtained on behalf of the plaintiff in an action in the City of London Court, calling on the defendant and on the judge of the Court to shew cause why the latter should not proceed to hear and determine the action.

The plaintiff was a passenger from Hamburgh to London on board a ship of the defendants. His luggage, which had been placed in the hold of the vessel, was lost during the voyage, and he brought an Admiralty action in rem to recover damages for the loss. When the case came on for hearing the judge of the City of London Court held that he had no jurisdiction, and dismissed the action with costs.

The County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2, enacts that "Any county court appointed, or to be appointed, to have Admiralty jurisdiction, shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:—

"(1.) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed three hundred pounds . . . ."

G. Barnes, for the defendant, shewed cause. The claim is not one arising out of an agreement made in relation to the carriage of "goods" in any ship. That word means wares or merchandise, and does not include passengers' luggage, which differs in many

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respects from goods; thus it would not be the subject of general average or salvage, but would stand in the same position as provisions or stores: *Brown* v. *Stapyleton* (1). A policy on goods is said in Marshall on Marine Insurance, part 1, chap. 8, to mean only such goods—merces—as are merchantable, i.e., cargo put on board for the purposes of commerce.

Edward Pollock, supported the rule. The Act 31 & 32 Vict. c. 71, s. 3, gave jurisdiction to county courts having Admiralty jurisdiction in claims for damage to cargo where the amount claimed does not exceed £300, and the term "goods" in the Act of 1869 must have a more extended application than the word "cargo" in the Act of 1868. The fact that things are taken as passengers' luggage under the contract to carry him does not alter their character of goods: and the agreement is in relation to the use of the ship, and therefore within the jurisdiction of the county courts, although the Court of Admiralty had no original jurisdiction in such cases: *Cargo ex Argos* (2); *The Alina*. (3) Luggage carried with a passenger without extra charge is within the description, "articles, goods, or things" in the Railway and Canal Traffic Act, 1854, s. 7: *Cohen* v. *South Eastern Ry. Co.* (4)

DAY, J. I am of opinion that the judge of the City of London Court was right in his decision. I do not think the cases cited help us, for the Act must be construed by itself, and I have no hesitation as to the manner in which it should be construed. It seems to me that the first part of sub-s. 1, which gives jurisdiction over claims arising out of agreements made in relation to the use or hire of a ship, refers to claims under charter-parties, and the next clause "in relation to the carriage of goods on any ship," to claims under bills of lading. We are asked to extend the latter to claims in respect of passengers' luggage, but the agreement in this case was not made with reference to the carriage of goods, but was one for the carriage of a passenger, and it is only as incidental to this agreement that the luggage was

(1) 4 Bing. 119.
(2) Law Rep. 5 P. C. 134.
(3) 5 Ex. D. 227.
(4) 2 Ex. D. 253.

carried. This seems to me to shew that such luggage was not "goods" in the sense in which that term is used in the section.

SMITH, J., concurred.

Rule discharged.

Solicitor for plaintiff: *R. Greening.*

Solicitors for defendant: *Stokes, Saunders, & Stokes.*

A. M.

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SHAW *v.* SIMMONS.

Dec. 10.

Company—Unregistered Society—Formation before the Companies Act, 1862—*Change of Members—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 4.

An association, consisting of more than twenty persons, was formed before the commencement of the Companies Act, 1862, to receive contributions from the members, and sell the money in hand, from time to time, in shares varying from 20*l.* to 100*l.*, to the highest bidder among them. The premiums paid by the purchasers were divided as profits among all the members. When the amount of the contributions and profits of a member who had purchased a share equalled the amount of such share, or, in the case of a member who did not borrow, when the amount of his contributions and profits equalled the amount of the share in respect of which he had joined, and he was paid off, membership ceased in respect of such share. New members, however, were continually joining, and the existence of the society was continuous:—

Held, that the association was not "formed" within the meaning of s. 4 of the Act on each occasion of a change of membership, and did not require to be registered under the Act.

CASE stated on appeal from the County Court of Warwickshire holden at Birmingham.

The action was brought upon a joint and several promissory note signed by the defendant as principal and by sureties under the following circumstances:—

The plaintiff and the defendant were at the date of the note members of a society called the No. 2 Permanent Money Society, which was formed in 1861 and was not registered under the Companies Act, 1862.

Most of the persons, numbering about 350, composing the society had become members since the Companies Act, 1862, came into operation, but some were members when the society was originally formed and had continued to be so to the present time. The society was formed for the purpose of receiving contributions from members and from time to time selling the

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money in hand to the highest bidder among the members in shares varying from 20*l.* to 100*l.* The premiums paid by the purchasers are divided as profit in certain proportions among the members for the time being, after deducting a small portion to form a reserve or sinking fund.

The manner in which the business of the society is carried on is not material to the question reserved in this case except so far as it relates to the alteration in the constitution of the society by persons joining as or ceasing to be members. The evidence on this point was stated by the county court judge in his judgment as follows:—

(a.) The purchaser of a 50*l.* share receives 50*l.* less the premiums bid on purchasing and inquiry and solicitors' fees, and is credited in his book with the amount of contributions paid by him and with his proportion of the profits accrued due, and binds himself with sureties to continue his contributions until his past and future contributions and proportion of the profits equal 50*l.* Shares for more or less than 50*l.* are purchased on similar principles. The purchaser ceases to be a member in respect of that particular share when his contributions and share of profits equal the amount for which he has become a member, but if he has fully contributed in respect of all his shares he has the power of resuming his membership immediately or at any subsequent time.

(b.) Members may join on any club night and for any number of shares provided that they are not liable to contribute in respect of more than 300*l.* at any one period.

(d.) Before the original members had paid up their contributions for their first shares new members had begun to contribute, and before these new members had fully contributed their shares others had joined and begun to contribute, and so on down to the present time, and in that manner and to that extent the continuous life of the society had been maintained. The normal period of contribution to each share is fourteen quarters. (1)

(1) At the end of this time the contributions and share of profits of a member who had not borrowed would balance the amount for which he subscribed, and provision was made for paying off the amount due when this took place, and on such payment membership in respect of the share so paid off ceased.

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(e.) A new member joining on any club night becomes entitled to share in the profits of the sale of money sold during his membership, whether contributed before or since he joined, and all moneys due to the society at the time he joins, and subsequently to become due while he remains a member, are intended to form a security to him for the repayment of his contributions and profits.

(f.) The officers of the society continued in office for old and new members alike, and at the termination of the period necessary to complete the contributions to a share no change whatever occurs in the constitution of the society except that the membership in respect of the share fully contributed to then ceases, but it becomes optional with the individual member to continue to contribute for other shares or not.

(*g.*) Members contributing in respect of less than 300*l.* at one period may join for fresh shares on any club night, and members contributing may, and often do, as soon as one share is fully contributed commence to contribute for another.

The defendant joined the society and purchased a 50*l.* share. The promissory note sued on was given to the plaintiff as one of the trustees of the society to secure the balance that should at any time be due from the defendant in respect of this share. Changes took place by persons joining or leaving the society between the date at which the note was given and the time at which it was sued on. The plaintiff was not personally interested in the note, except as one of the members of the society, and he sued on behalf of the society to recover the balance appearing to be due after giving credit for contributions and profits. The county court judge gave judgment for the plaintiff.

The question for the opinion of the Court was whether the society was within the prohibition of the Companies Act, 1862, s. 4, and illegal so as to prevent the plaintiff recovering in this action.

Nathan, for the defendant. This is an association having for its object the acquisition of gain, and within the prohibition of the Companies Act, 1862 (1). At its original formation before

(1) 25 & 26 Vict. c. 89, s. 4, enacts (*inter alia*): "No company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act, for the purpose of carrying

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the Companies Act, 1862, it did not require to be registered either by 7 & 8 Vict. c. 110, or by the subsequent statutes 19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14: *Bear* v. *Bromley* (1).

The original association or partnership, however, does not exist, for there have been changes every time a member left or a new one joined. The partnership as it exists at the present moment has therefore been formed after the commencement of the Companies Act, 1862, and is illegal, and this note, which was given to further the objects of the association, was given for an illegal consideration, and the plaintiff cannot recover on it: *Mexican and South American Company, Re Aston* (2); *Jennings* v. *Hammond* (3); *Padstow Assurance Association* (4); *Shaw* v. *Benson.* (5)

Jelf, Q.C., and *Hugo Young*, for the plaintiff, were not called on.

DAY, J. I am of opinion that the plaintiff is entitled to retain the judgment. The question is simply whether this is a company, association, or partnership of more than twenty persons formed after the commencement of the Companies Act, 1862, for the purpose of carrying on a business that has for its object the acquisition of gain by the company or the individual members. The question, however, is not altogether free from difficulty. No doubt this company looked at in the light of a partnership may be considered as a new partnership every time that a change takes place in the members composing it by a new one being taken in or an old one leaving. The question is whether the Act should be read so as to give to the word "formed"—a company "formed" after the commencement of this Act—this strict technical meaning, or whether the word should be taken in its ordinary and popular sense. If, when the question is asked, "When was this company formed?" we find, as we should, that the

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on any other business (*i.e.*, other than banking) that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries.

(1) 18 Q. B. 271.
(2) 27 Beav. 474.
(3) 9 Q. B. D. 225.
(4) 20 Ch. D. 137.
(5) 11 Q. B. D. 563.

invariable reply would be, "It was formed in the year 1861," why are we to say, on the contrary, that it was not then formed, but was formed when the last person who desired to borrow money from it became a member. It seems to me that this would be to put an unnatural and unduly strained construction on the Act, and that we ought to take the words in their popular meaning. If so, this company was formed before the commencement of the Companies Act, 1862, and is not illegal for want of registration.

SMITH, J., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Robinson, Preston, & Stow, for John Price, Birmingham.*

Solicitors for Defendant: *Mackeson, Taylor, & Arnould, for Buller, Bickley, & Cross, Birmingham.*

A. M.

GULLY, APPELLANT; SMITH, RESPONDENT.

Dec. 1.

Highway—Wilful Obstruction—Omission to remove Obstruction—Highway Act, 1835 (5 & 6 *Wm.* 4, *c.* 50), *s.* 72.

In order to constitute wilful obstruction of a highway within 5 & 6 Wm. 4, c. 50, s. 72, it is not necessary that there should be any act of commission, but the offence may be complete by an omission on the part of the person whose duty it is to remove an obstruction to do so after notice.

CASE stated by justices on a summary conviction.

At a petty sessions for the division of Axbridge, in the county of Somerset, the appellant was charged on the information and complaint of the respondent, the surveyor of highways of the district, with unlawfully and wilfully obstructing the free passage of a highway at Churchill Batch, by allowing soil and stones to remain thereon after notice from the respondent.

The information was preferred by the respondent under the provisions of 5 & 6 Wm. 4, c. 50, s. 72, and at the hearing it was proved or admitted as follows:—

The appellant was tenant of lands bounded by the highway which, at the point where the alleged obstruction occurred, passed by a cutting, about twenty feet below the general level of the abutting lands, through a marly stratum. The retaining

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wall was nearly perpendicular, and of very insufficient substance to retain the bank of marl and soil, and was very badly constructed.

During the preceding summer the appellant had caused some repairs to be effected to the wall by building and stopping up holes therein, and pointing the face thereof, and a labourer was at work there for a month.

During the preceding winter, owing it would appear to the exceptional wetness of the season, a portion of this wall had in consequence of the pressure of the bank subsided, and from eight to ten loads of stone and soil had fallen, carrying with it the bank behind, a small portion of which had fallen on the metalled portion of the highway, and formed a dangerous obstruction, which up to the time of the information had not been removed, the respondent having received no orders from the highway board to remove it.

Notices had been given by the respondent to the appellant to remove the obstruction, which had not been complied with, though he said he would take it away.

It was contended on behalf of the respondent in the opening of his case that the alleged obstruction was a dangerous one, and was wilful by the fact of its being allowed to remain after notice to remove it, and that, without any positive act of the appellant, an offence under the statute had been committed, and in support of such contention the cases of *Fearnley* v. *Ormsby* (1) and *Walker* v. *Horner* (2) were cited.

On behalf of the appellant it was contended, on the authority of the same cases, that admitting all the facts as above stated to have been proved, but not admitting the liability of the appellant or of his landlord to repair the wall in question (which the appellant's advocate stated was erected about fifty years ago by the Bristol turnpike trustees, though this was not proved, nor such statement admitted by the respondent), no offence under the provisions of the Act had been committed by the appellant, inasmuch as the obstruction was not caused by any specific, positive, or overt act of his; that s. 72 of the Act, which applies to any person "who shall in any way wilfully obstruct the free passage

(1) 4 C. P. D. 136. (2) 1 Q. B. D. 4.

of any such highway," ought to be read and construed in reference to and in connection with the preceding clauses of that section, all of which specifically relate to acts of commission, and not of omission; and that if by the default of the appellant an obstruction such as that alleged had existed, it was not within the summary jurisdiction of the justices, but constituted an offence which was not provided for by the Act, and that he could only be rendered answerable for such offence by indictment.

The justices were of opinion that an offence under s. 72 of the statute had been committed by the refusal of the appellant to remove the obstruction after repeated notice, and further that, inasmuch as the appellant had admitted repairing the wall in question within a recent period, and as this constituted an act of ownership, it was the appellant's duty to remove such obstruction, and that his failing to do so for so long a period, and after repeated notice from the highway board, rendered such obstruction wilful, and was an offence under the section. They therefore adjudged the appellant guilty of the charge preferred against him.

The question for the opinion of the Court was whether the fact of the appellant failing to remove the alleged obstruction without his having done any positive and wilful act whereby such obstruction was caused, and after repeated notices given by the respondent to remove the same, amounted to a wilful obstruction, and was an offence under the Act.

Murch, for the appellant. The offence under the Highway Act, 1835, s. 72, is in case a person "shall wilfully obstruct the free passage" of a highway. There must be some act done by the person charged, such as laying stones on the highway: *Fearnley* v. *Ormsby* (1), or placing a cart or other obstruction upon it. Merely suffering the highway to be obstructed as, for instance, by overhanging trees, is not a wilful obstruction: *Walker* v. *Horner* (2); where there was notice of the obstruction, but the Court quashed the conviction. *Croasdill* v. *Ratcliffe* (3) was a case where permitting water to flow over a highway was held not a wilful obstruction within the section. The notice to the appellant to remove the obstruction cannot affect the matter,

(1) 4 C. P. D. 136. (2) 1 Q. B. D. 4. (3) 5 L. T. (N.S.) 834.

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for there was no duty on him to do so. The fact that he had repaired the wall does not cause the inference that it was his duty to do so: *Stockport and Hyde Highway Board* v. *Grant.* (1)

Pitt Lewis, for the respondent, was not called on.

LORD COLERIDGE, C.J. It appears to me that the magistrates were right, and that their decision should be affirmed. The only question intended to be asked, and the only one we are entitled to answer, is—whether the fact of the appellant failing to remove this obstruction without having done any positive and wilful act whereby such obstruction was caused, and after the notices given him by the respondent to remove the same, amounted to a wilful obstruction, and was an offence under the Act. There is something said in the case about the original making of the wall and about its present ownership, but no question is asked us except that which I have stated. It appears to me that directly it is stated that the wall, and the soil which the wall upheld, are the property of the appellant (and it seems to me there was evidence from which the magistrates might properly infer that), and when it is shewn that the wall and soil having fallen across the highway the appellant was required to remove that which belonged to him and obstructed the highway, then there was that which was wilful on his part in leaving them there. It is said there must be some act on his part, and not merely an abstaining from doing some act, to make the word "wilful" apply. There are a number of cases in which an obstruction may not be in the first instance wilful, but yet when it is called to the notice of the owner of the property, and he is required to remove it and does not, it remains there by an exercise of his will; in other words, leaving it there is a wilful act on his part.

The cases do not seem to me to conflict with this view. *Walker* v. *Horner* (2) was decided by the majority of the Court on the ground that the section deals with obstructions to the surface of a highway, and that the matter complained of was not of the same class as the offences mentioned, and therefore was not within the section. If the matter were res integra, then on the authority of Hawkins, who says (3), "also it seemeth clear that it is a like

(1) 51 L. J. Q. B. D. 357. (2) 1 Q. B. D. 4.
(3) Hawkin's Pleas of the Crown, chap. 76, s. 147.

nuisance to suffer the ditches adjoining to a highway to be foul by reason whereof it is impaired, or to suffer the boughs of trees growing near the highway to hang over the road in such a manner as thereby to incommode the passage," I should have been disposed to agree with Cockburn, C.J., rather than with the majority of the Court in *Walker* v. *Horner*. (1) The decision however is binding, but it does not apply to the present case because the judgment was put on a ground not applicable here. Then in *Croasdill* v. *Ratcliffe* (2) the appellant had been convicted on the ground that she had unlawfully and wilfully obstructed the free passage of certain highways by causing water to run over them to the public inconvenience and hindrance of free passage. The argument was addressed to the Court that though rain water was not an offensive thing in itself, yet when it was in such excessive quantity as to obstruct the free passage it became within the words in the section, "an offensive thing," and that question was the one decided by the Court. In *Fearnley* v. *Ormsby* (3) all that the Court decided was that where the surveyor had put down a quantity of stuff which when left in the road at night was dangerous, though by day it was not so, the surveyor could be convicted under s. 72, notwithstanding he might also have been guilty of an offence under s. 56. To my mind it is clear that, though obstruction may have begun with an act for which the appellant was not responsible, yet if he ought to have removed that which caused the obstruction, and after notice did not do so, the act of leaving it becomes wilful on his part. That is the case on the facts submitted to us by the magistrates, and on that state of facts their judgment must be confirmed.

MATHEW, J., concurred.

Judgment for the respondent.

Solicitors for appellant: *Crowder, Anstie, & Vizard, for F. Wood, Axbridge.*

Solicitors for respondent: *Aldridge, Thorne, & Morris, for E. F. Wade, Wrington.*

(1) 1 Q. B. D. 4. (2) 5 L. T. (N.S.) 834.

(3) 4 C. P. D. 136.

A. M.

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Dec. 12.

COX, Appellant; ANDREWS, Respondent.

Gaming—Betting Houses—Information or Advice with respect to Bet or Wager—Advertisement—Betting Acts, 1853 *and* 1874 (16 & 17 *Vict. c.* 119 *and* 37 *Vict. c.* 15).

The Betting Act, 1874, is confined to such bets as are mentioned in the Betting Act, 1853, that is to bets made in any house, office, or place kept for betting, and the Act does not apply to advertisements offering information for the purpose of bets not to be made in any house, office, or place kept for that purpose.

Case stated by a magistrate of a metropolitan police court on two summary convictions.

An information was preferred by the respondent against the appellant under s. 3, subss. 1 and 2 of the Betting Act, 1874, charging that the appellant did unlawfully publish and cause to be published an advertisement in a newspaper called the *Licensed Victuallers' Gazette and Hotel Courier*, whereby it was made to appear that he would, on application, give information and advice with respect to an event or contingency as mentioned in the statute 16 & 17 Vict. c. 119, that is to say, an event or contingency relating to a horse-race, contrary to the statute: and further that he did unlawfully publish and cause to be published an advertisement in a newspaper called the *Licensed Victuallers' Gazette and Hotel Courier*, with intent to induce some person or persons to apply to him with the view of obtaining information and advice with respect to such an event or contingency as is mentioned in the statute 16 & 17 Vict. c. 119, that is to say, an event or contingency relating to a horse-race, contrary to the statute. The appellant was convicted and fined 10*s.* upon each charge, and ordered to pay costs, but a case was stated from which the following facts appeared:—

Upon the hearing of the information it was proved or admitted that the appellant was the proprietor and publisher of the newspaper called the *Licensed Victuallers' Gazette and Hotel Courier*, and that he published the number of the newspaper, dated the 31st of March, 1883, which contained the following paragraph:—

"To our Readers: Special and important.—'Centaur' scored his first success of the season when he gave Knight of Burghley

for the Lincoln Handicap last Tuesday. Our correspondent will use every effort to follow up his success, and those of our readers who want the most reliable and latest news from Northampton next week should not fail to avail themselves of 'Centaur's' wire finals, sent direct from the course. They may rely on having something as good for the two principal events next week as they had in Knight of Burghley last Tuesday. 'Centaur's' finals cost but half-a-crown each, or the two days' racing five shillings, for which post-office orders or stamps must be sent to Mr. W. H. Cox, 17, Southampton Street, Strand, London. The subscription to 'Centaur's' wire finals for the season, which includes all the principal races, is 3*l.* 10*s.*"

It was proved or admitted on the part of the respondent that "Centaur" was one of the correspondents of the newspaper and regularly employed by the appellant in supplying him, for the purposes of his newspaper, with all such news and intelligence relating to horse racing as is usually and lawfully supplied by such correspondents to newspaper managers, and by them to the public.

It was thereupon contended on the part of the appellant that the paragraph was not an advertisement, either as matter of fact or as matter of law, and that even if it was an advertisement it purported to relate only to such news and intelligence relating to horse races as are usually and lawfully published by newspapers and other publications, and by telegraphic agencies, and further that there was no evidence to shew that the paragraph related to information and advice for the purpose of betting, as by the Betting Acts, 1853 and 1874, is required to constitute any offence under these Acts, and further that the publishing of the paragraph did not, nor did the facts admitted or proved as stated above, constitute any offence under the Acts, or either of them, and further that, even if guilty under either of the sub-sections, one act could not constitute two different offences, and therefore the defendant could not be convicted on both summonses. The defendant was convicted subject to the opinion of the Court on the points raised by the case.

The statute 16 & 17 Vict. c. 119, recites: "Whereas a kind of gaming has of late sprung up tending to the injury and

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demoralization of improvident persons by the opening of places called betting-houses or offices and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies;" and enacts—

Sect. 1: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by, or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law."

Sect. 2: "Every house, room, office, or place opened, kept or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming-house within the meaning of an Act of the Session holden in the eighth and ninth years of Her Majesty, chapter one hundred and nine, to amend the law concerning games and wagers.

Sect. 3: "Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid or either of

them; and any person having the care or management of, or in any manner assisting in conducting the business of any house, room, office, or place opened, kept, or used for the purposes aforesaid, or either of them, shall, on summary conviction thereof before any two justices of the peace, be liable to forfeit, &c."

Sect. 4: "Any person being the owner or occupier of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, or any person acting for or on behalf of any such owner or occupier, or any person having the care or management or in any manner assisting in conducting the business thereof, who shall receive directly or indirectly any money or valuable thing as a deposit on any bet on condition of paying any sum of money or other valuable thing, on the happening of any event or contingency of or relating to a horse race, or any other race, or any fight, game, sport or exercise, or as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any such event or contingency, and any person giving any acknowledgment, note, security, or draft, on the receipt of any money or valuable thing so paid or given as aforesaid, purporting or intended to entitle the bearer or any other person to receive any money or valuable thing on the happening of any such event or contingency as aforesaid, shall upon summary conviction thereof before two justices, forfeit, &c."

Sect. 7: "Any person exhibiting or publishing, or causing to be exhibited or published, any placard, handbill, card, writing, sign, or advertisement, whereby it shall be made to appear that any house, office, room, or place is opened, kept, or used for the purpose of making bets or wagers in manner aforesaid, or for the purpose of exhibiting lists of betting, or with intent to induce any person to resort to such house, office, room, or place for the purpose of making bets or wagers, in manner aforesaid, or any person who, on behalf of the owner or occupier of any such house, office, room, or place, or person using the same, shall invite other persons to resort thereto for the purpose of making bets or wagers in manner aforesaid, shall upon summary conviction thereof before two justices of the peace forfeit, &c."

37 Vict. c. 15, recites: "Whereas it is expedient to amend the Act of the session of the sixteenth and seventeenth years of

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the reign of Her present Majesty, chapter one hundred and nineteen, intituled "An Act for the suppression of betting houses," and enacts—

Sect. 3: "Where any letter, circular, telegram, placard, handbill, card or advertisement is sent, exhibited or published,—

"(1.) Whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will on application give information or advice for the purpose of or with respect to any such bet or wager, or any such event or contingency as is mentioned in the principal Act, or will make on behalf of any other person any such bet or wager as is mentioned in the principal Act; or

"(2.) With intent to induce any person to apply to any house, office, room, or place, or to any person, with the view of obtaining information or advice for the purpose of any such bet or wager, or with respect to any such event or contingency as is mentioned in the principal Act; or

"(3.) Inviting any person to make or take any share in or in connection with any such bet or wager.

"Every person sending, exhibiting, or publishing, or causing the same to be sent, exhibited, or published, shall be subject to the penalties provided in the seventh section of the principal Act, with respect to offences under that section."

E. Clarke, Q.C. (*Stansfeld* with him), for the appellant. The Betting Act, 1874, is intended to supplement the former Act, with which it is to be read. Both are intended to suppress betting houses or offices. The former Act dealt with bets made in such places, and the latter deals with advertisements relating to bets which came within the first Act, that is bets made in a betting house. That was not the case here, and the conviction was wrong. Any other construction would render persons liable to punishment for merely publishing the state of the odds.

Mead, for the respondent. The bets or wagers mentioned in the principal Act are bets on horse races or other races, fights, games, sports or exercises, whether by a simple bet or by deposit. The offences in the first Act are (s. 3) keeping a house or office for such purposes, and assisting to conduct the business of a house kept for such purposes, (s. 4) receiving a deposit on account

of a bet, and (s. 7) advertising such houses. The amending Act has a much wider application, and was intended to suppress all advertisements offering information for the purpose of making bets. The Act applies in express terms not to the offences created under the principal Act but to the bets or wagers *or* the events or contingencies mentioned in it. An advertisement whereby a person, either in England or abroad, offers to give advice for the purpose of such bets or wagers or with respect to such events or contingencies, is, by s. 3, sub-s. 1, an offence, and that is what has been done in this case. Publishing the state of the odds in a newspaper would not be within the Act, for it would not be an offer to give information "on application" for the purpose of betting.

MATHEW, J. I am of opinion that these convictions must be quashed. To hold otherwise would, in my opinion, be to put an unreasonable construction on the Act, and that, unless I am coerced by very clear language, I shall not do. All the legislation is intended, as I think, to strike at a real mischief. The Betting Act of 1853 was intended to suppress betting houses, and it prohibits the use of "any house, office, room, or other place" opened, kept or used for the purpose of betting, and imposes a penalty on the person who keeps such a house. The Betting Act, 1874, is, by sect. 1, to be construed as one with the prior Act, and sub-s. 1 of s. 3 deals with "any such bet or wager, or any such event or contingency as is mentioned in the principal Act." The bets or wagers which are mentioned in the principal Act are bets and wagers made in a house, office, room or other place kept for the purpose of betting, and those are the bets or wagers intended to be aimed at in the Act of 1874. If we were to hold otherwise, we should not be reading the two Acts together, and should have to extend the words to the case of any one inserting an advertisement that he would give information about a foot-race.

DAY, J., concurred.

Conviction quashed.

Solicitors for appellant: *J. C. Rutter & Sons.*
Solicitors for respondent: *Wontner & Sons.*

A. M.

1883
Dec. 15.

MELVILLE and Others *v.* STRINGER.
HOUGHTON and Others, Claimants.

Bill of Sale—Form—Several Mortgagees—Consolidation of Securities—Power to seize on any Default—45 & 46 *Vict. c.* 43 (*Bills of Sale Act*, 1878, *Amendment Act*, 1882), *ss.* 7, 9.

By a bill of sale made between the grantor and four sets of mortgagees to secure divers sums owing to each respectively, and a further advance by all the mortgagees, the grantor assigned to them certain goods and covenanted separately with each mortgagee to pay on demand the sum owing to each, and it was declared that if default should be made in payment of any sum thereby secured, or if any other default or event mentioned as a cause of seizure in s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882, should be made, it should be lawful for the mortgagees to seize and sell the goods assigned, and repay all the moneys owing. The bill of sale was executed at the foot of a schedule annexed to it:—

Held, that the bill of sale did not contravene the Bills of Sale Act, 1878, Amendment Act, 1882.

Appeal from the Wigan County Court.

The plaintiffs, execution creditors of Stringer, seized goods which were claimed under a bill of sale of the 1st of June, 1883, made between Stringer of the first part, Houghton and Hallmark of the second and third parts, Edwardson of the fourth part, and Houghton, Hallmark, Smith, and Edwardson, thereinafter called the mortgagees, of the fifth part, whereby, after reciting that Stringer was indebted to Houghton and Hallmark 387*l.* 0*s.* 3*d.*, and had given them a bill of exchange for 92*l.* 15*s.* 3*d.*, part thereof, and was also indebted to Hughes 250*l.*, for which Hallmark and Smith had joined with Stringer in giving a promissory note, payable by instalments, whereof 200*l.* was due, and that Stringer was also indebted to Edwardson 97*l.* 4*s.* 4*d.*, and that Houghton, Hallmark, Edwardson, and Smith had agreed to lend Stringer the further sum of 150*l.* out of moneys belonging to them on a joint account, for the purpose of enabling Stringer to carry on his business at a certain hotel, and reciting that he had agreed to secure the payment of the said sums,—Stringer, in consideration of the premises and the 150*l.*, assigned to the

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mortgagees the goodwill, furniture, and stock-in-trade of the hotel, and covenanted separately with each party to pay on demand the sum owing to each, and it was declared that if default should be made in payment of any sum or sums thereby secured, or the interest thereof, at the respective times at which the same were covenanted to be paid, or if any other default or event mentioned as a cause of seizure in s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882, should be made or happen, it should be lawful for the mortgagees at any time thereafter to enter and seize and sell the property, and pay the expenses and the 150*l.* and interest and all the moneys owing pro ratâ to the mortgagees, and the surplus to the mortgagor.

Annexed to the bill of sale was a schedule, at the end of which the signature and seal of the grantor were placed.

The county court judge gave judgment for the claimants, and stated a special case, setting forth the bill of sale. The question was whether the bill of sale was valid.

Ambrose, Q.C. and *Woodard*, for the execution creditors, appellants. By 45 & 46 Vict. c. 43, s. 9, a bill of sale made or given by way of security for the payment of money by the grantor thereof "shall be void unless made in accordance with the schedule to this Act annexed." This bill of sale is not in accordance with the form in the schedule. First, It is not executed at the end of the deed, but at the foot of the schedule to it, which is not on the same paper, and does not form part of the deed.

[PER CURIAM. It is "annexed thereto": s. 4, and surely forms part of the deed.]

Secondly. It is not in the simple form prescribed, but is a combination of several securities. There are four sets of mortgagees, each of whom might have taken a security in the statutory form, in which case each would have been entitled to seize on default in payment of the sum due to him, but not on default in payment of the others. The vice of this bill of sale is that on any default all the mortgagees may seize and realize the goods. Further, some interval between demand and seizure must be allowed, but here the goods may be seized directly after demand

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and non-payment. The mortgagor cannot be expected to have the money always on hand ready. The bill of sale is invalid: *Davis* v. *Burton*. (1)

French, for the claimants, respondents. This bill of sale is fairly within the Act. The consolidation of securities was a proper saving of cost, and did not contravene the Act. The power to one person to seize for default of the grantor in paying another is expressly provided for by s. 7, which allows a power of seizure if, inter alia, the grantor shall make default "in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security;" and the form in the schedule has a space for the insertion of terms "for the maintenance of the security." Nothing can be more necessary for maintaining the security than a covenant empowering seizure on any default which may entitle others to realize the security.

[DAY, J. Do you contend that if four bills of sale had been prepared, each empowering a seizure on default of performance of the covenants in the other, such bills of sale would be valid under the Act? To uphold your argument you must say so.]

Yes. In *Davis* v. *Burton* (1), as was pointed out by Cave, J., the bill of sale made the goods seizable on events not included in s. 7.

Ambrose, Q.C., replied.

MATHEW, J. The judgment of the county court judge for the claimants and upholding the bill of sale must be affirmed. In my opinion it does not depart from the terms of the Act of Parliament nor violate the provisions of s. 9 of the Bills of Sale Act, 1882. The nature of the transactions is plain; the debtor owed several creditors different sums of money payable at different times. He was anxious to get time, and the different creditors were willing that he should have time to pay, provided that in a certain sense their securities were consolidated and charges were given on the property to secure the whole amount; but the parties stipulated that in case default should be made in payment of any one at the date specified in the deed the whole amount should

(1) 10 Q. B. D. 414.

become payable, and there should be a right to enter, seize, and sell to realize the whole amount. That eminently businesslike arrangement is said to be prohibited by this Act. By s. 9 the bill of sale must be in accordance with the form in the schedule, and that part of the form not in italics provides for the case of past and present advances, and stipulations for payment of the principal sum on a particular day, but they are followed by alternative provisions from which it appears clear that any form of bill of sale may be adopted so as to give security for any sum of money which is the consideration for the bill of sale. What may the bill of sale contain according to this statute? Any covenants "for the maintenance of the security," and the form of the covenant for the maintenance of the security entitles the grantees or any set of them to enter and seize on any default mentioned in s. 7, viz., inter alia, "if the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant . . . necessary for maintaining the security." The defaults and covenants in question are, I think, within that clause.

DAY, J. There is no substantial objection to the bill of sale.

SMITH, J. The first question is whether the covenant was for maintenance of the security? I think it was. Secondly, can such a covenant be inserted in the specimen form? I think it can.

Judgment for the respondents.

Solicitor for appellants: *James Clemmet, Manchester.*
Solicitors for respondents: *Last & Sons.*

J. R.

1883
Dec. 12.

JACQUES *v.* HARRISON.

Practice—Action for Recovery of Land on Forfeiture—Judgment by Default—Power to set aside Judgment on Application of Equitable Mortgagees not Defendants—Order XXVII. r. 15.

A judgment by default in an action against a lessee for recovery of land on forfeiture may be set aside under Order XXVII. rule 15, on the application of equitable mortgagees, although not parties to the action.

Appeal from a decision of Field, J., at Chambers.

Land at Bowes Park was held by the defendant under a lease at ground rents. The lease contained covenants by the defendant to build houses on the land. A building society bought the reversion of the lease and sold the ground rents to the plaintiff, and Mr. Braunstein acted as the solicitor of the society in the sale. The society advanced to the defendant a sum exceeding 2000*l.* on the security of the lease and took a deposit of the title deeds. The society went into liquidation. On the 10th of September, 1883, the plaintiff wrote to Mr. Braunstein—"I was at Bowes Park on Saturday last and was surprised to find that the houses are not yet finished, indeed, that very little has been done to them since I completed the purchase of the ground rents on the 15th of June last. I found too, that no one was in charge of the premises, and that they were therefore exposed to the depredation of any dishonest persons who may be in the neighbourhood. I went to the nominal lessee (Harrison) for an explanation and he informed me that he has no interest whatever in the property, and never had beyond that of foreman of works. I need scarcely tell you that the non-completion of the houses is contrary to the assurance which you gave me, that they should be finished with all reasonable speed, and that it is also a serious breach of covenant contained in the leases that the houses should be completely finished, fit for habitation and use, and to the satisfaction of the lessee's surveyor before the 15th of September inst. That very little or nothing should have been done for more than two months is very unsatisfactory to me, and I see no course open to me but to instruct my solicitors after the 15th inst. to issue a writ of ejectment against all parties who have any

interest in the leasehold of these houses." On the 12th of September Mr. Braunstein wrote in answer "Until the liquidator is appointed I fear I can give you no reply that would be satisfactory to you, but if you will defer taking action until after the 19th inst. when the question comes before the judge for his decision, I will at the earliest possible moment inform you of the exact position of affairs." The plaintiff replied declining to wait after the 15th of September, when the time expired for completion of the houses as stipulated in the leases, and on the 17th of September he issued and served on the defendant alone nine writs for the recovery of different parts of the land for forfeiture by breach of covenant in not building the houses. No notice was given to the official liquidator, who, however, on Saturday the 6th of October heard of the writs, but, having to go into the country on the following Tuesday and Wednesday, did not then interfere; on the 9th judgment by default of appearance was signed, and on the 10th the plaintiff's solicitors wrote to Mr. Braunstein informing him thereof, and that writs of possession would be issued next day. The letter did not reach Mr. Braunstein until the 11th of October, when he forwarded it to the official liquidator, who received it on the 12th of October, and on the 17th of October took out a summons to stay, which was adjourned whilst proceedings were taken before Bacon, V.C., to set aside the forfeiture in one of the actions on the ground that no proper notice under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14, had been given before the action was brought, as the notice which had been given contained no request to the lessee to make compensation in money for the breaches of covenant which were the causes of forfeiture, and had other defects. The Vice-Chancellor intimated an opinion that the notice was insufficient, and that the judgment should be set aside, but said that the application to set aside the judgment should be made in the Queen's Bench Division, and ordered that on payment of the ground rents and an undertaking by the official liquidator to complete the buildings, possession should be given to him as representing the equitable mortgagees.

An application in the Queen's Bench Division was accordingly made to Field, J., on behalf of the official liquidator at Chambers,

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for an order to set aside the judgment in one of the actions, but was refused.

On appeal,

Wills, Q.C., and *Beaumont*, for the official liquidator, moved for the order. Notice requiring compensation was a condition precedent to the action: 44 & 45 Vict. c. 41, s. 14. No such notice was given. But the defendant did not appear and raise the defence which would have been an answer to the action. So judgments were obtained, which are a blot on the title of the equitable mortgagees, and might indeed perhaps put an end to the lease. The liquidator as representing the equitable mortgagees is entitled to apply to set the judgments aside. The Judicature Act of 1873 (36 & 37 Vict. c. 66), s. 24, subs. 5, provides that nothing in the Act shall disable the Court "from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof . . ." shall be at liberty to apply for a stay of proceedings, and the Court may thereupon make such order as shall be just. By Order XXVII., rule 15, "Any judgment by default, whether under this order or under any other of these rules, may be set aside by the Court or a judge, upon such terms as to costs or otherwise as such Court or judge may think fit." Those terms are general, and do not restrict the application to the defendant or any specified person. The judgments here were "by default," and were signed under one of the rules, viz., rule 8 of Order XIII. This case may not come exactly within the terms, but is certainly within the spirit of the Act and rules. In actions for recovery of land the Courts have always made rules of practice elastic so as to reach the person really interested in the land to make him pay costs: see *Thrustout* v. *Shenton* (1); *Hutchinson* v. *Greenwood* (2); *Doe* d. *Masters* v. *Gray* (3); *Anstey* v. *Edwards*. (4)

(1) 10 B. & C. 110.
(2) 4 E. & B. 324.
(3) 10 B. & C. 615.
(4) 16 C. B. 212.

Dec. 12. *F. O. Crump* shewed cause. The proceedings to judgment were regular, and it can only be set aside on an affidavit of merits, for fraud, or on some such ground. No affidavit of merits has been made, nor can it be, for there was an indisputable breach of covenant, and forfeiture. Fraud is not even imputed. The equitable mortgagees have no locus standi. The official liquidator knew of the action, and took no steps to intervene. He might pending this action have applied at Chambers under the Conveyancing Act, s. 14, sub-s. 2, or might, even after judgment, have issued a writ in the Chancery Division and have got relief. But he seeks a mode of relief not prescribed by the legislature. The procedure in actions for recovery of land is strictly prescribed in the Judicature Act and rules. A person not made a defendant yet wishing to come in and defend must be in possession, and must file an affidavit shewing that he is so: see Order XII., rule 25.

Wills, Q.C., replied. Proceedings under the Conveyancing Act were taken in the Chancery Division, to which, by s. 69, all matters within the jurisdiction of the Court under the Act are assigned. This application is not under that Act, but is to set aside the judgment. The official liquidator has been guilty of no delay disentitling him to relief. A judgment by default was set aside even after the lapse of a year in *Atwood* v. *Chichester*. (1) The judgment is of no use to the plaintiff since the order of Bacon, V.C. The question is merely one of costs.

GROVE, J. I am of opinion that this judgment should be set aside.

The action in which the judgment was signed was an action for recovery of land for forfeiture through not keeping certain houses in repair and not paying ground rents, by Harrison, the tenant under a lease equitably mortgaged to the parties who seek to set aside the judgment. It was known to the plaintiff, as appears from a letter of the 10th of September, that Harrison, whom he calls the "nominal lessee," had no interest in the matter. In the letter of the 13th of September, 1883, the plaintiff does not in distinct terms say "I shall issue a writ," but says

(1) 3 Q. B. D. 722.

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that he has no course open to him but to issue a writ, and thinks he ought to wait no longer. It is an intimation that if he waits he will give time to the 16th of September. We have no evidence that it came to the knowledge of the mortgagees. On the 17th of September the plaintiff issued nine writs against Harrison. There is nothing to shew that the issue of those writs came to the knowledge of the official liquidator, who represents the equitable mortgagees, until the 6th of October, a Saturday. Then it is admitted that he was negligent, more or less, in not preventing judgment being signed on the following Monday. On Tuesday and Wednesday he was necessarily absent and could not attend, but on Thursday he found this judgment had been signed. Under what circumstances had it been signed? An action had been brought against a man whom the plaintiff himself describes as the "nominal" lessee, and had no interest in the matter. The plaintiff and his advisers knew that Harrison had no interest, and that there was no probability of his defending. I do not know whether there was collusion or not, but all events there was no evidence of it. An application was made to Bacon, V.C., to set aside the judgment, and the Vice-Chancellor intimated his opinion that the judgment was improperly obtained, for he says there was a defence to the action, if no other, that the notice under the Conveyancing Act did not contain the requisites of the Act, inter alia, a request for compensation. Further, it appears from the decision of the Vice-Chancellor, that if he had had the power he would have set the judgment aside, but he had no power, and he said the parties must go to another Court, and they came here accordingly. We must take the judgment of Bacon, V.C., as correct. Then, have we the power? I think that Order XXVII. r. 15, which does not say on whose application, but that "any judgment by default . . . may be set aside," gives us that power, and that it is a very useful authority to give to the Court this case alone is sufficient to shew. For here mortgagees with an interest of more than 2000*l.* have a risk in their title, viz., an outstanding judgment which may imperil their mortgage money, and that judgment was obtained without their knowledge. There is certainly a delay of one day not satisfactorily explained; but on the other hand the plaintiff got judgment against a person with

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only a nominal interest and gave no notice, and yet it is said that the mortgagees must be affected by the judgment. Mr. Crump says the applicants have no locus standi. I do not agree with him. I think the judgment was improperly obtained and must be set aside. On what terms? It is admitted on both sides that this was only one of nine actions. We all think there was no necessity for bringing nine, although possibly the plaintiff had a legal right to bring them.

At present all I can say is that I am satisfied that this judgment should be set aside, and we reserve the question of costs until the other actions are before us.

HUDDLESTON, B. We ought to set this judgment aside, if we have the power to do so. I think that Order XXVII. r. 15, gives us that power.

HAWKINS, J. I am also of opinion that the language of Order XXVII. r. 15, gives us power to set the judgment aside. There is in that rule no limitation as to the persons who may apply to set it aside. Each case presents its own particular circumstances. But there is jurisdiction to set aside "any judgment by default" on such terms as the Court may think fit under that Order. Having regard to the circumstances of this case, I have no doubt we ought to exercise the power which we have. Harrison had entered into covenants with the lessor to build, and he was unable to pay the ground-rent or to finish the building, and was under very serious pecuniary obligations. It is not necessary to suggest or prove collusion between them, but I think that when this action was brought the plaintiff knew that in all probability the defendant would not defend; first, the defendant intimated it; secondly, it was his interest not to defend, for if he held the property he would leave himself under a liability which, if his lease were put an end to, he would be relieved from. I think the judgment ought to be set aside, and I quite agree as to the reservation of the question of costs.

Judgment set aside. (1)

Solicitors for official liquidator: *Learoyd & Learoyd.*

Solicitors for plaintiff: *Trollope & Winckworth.*

(1) On appeal, post, p. 165.

1883
Nov. 5.

[IN THE COURT OF APPEAL.]

WAKE *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF SHEFFIELD.

Local Government Act—Justices of the Peace, Jurisdiction of—Summary Proceedings—Expenses of sewering Street—Appeal to Local Government Board—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 268.

Upon the hearing of a complaint preferred before a police magistrate by the urban authority of the district acting under s. 150 of the Public Health Act, 1875, to recover the amount apportioned upon a frontager in respect of expenses incurred by the urban authority in sewering, &c., a street, the frontager objected that the plans referred to in the notice requiring him to execute the work, shewed that part of the work in respect of which upon his failure to comply with the notice the expenses were incurred, was executed upon land belonging to private owners:—

Held, that, as part of the work was executed on a street, the urban authority had power to fix the sum to be apportioned, and the magistrate had jurisdiction to entertain the complaint, and could only make an order for payment of the apportioned sum, and if the frontager was aggrieved by what the urban authority had done his only remedy was to appeal to the Local Government Board under s. 268 of the Public Health Act, 1875.

APPEAL from the decision of the Queen's Bench Division, discharging a rule nisi for a certiorari to remove into the High Court of Justice an order made by the stipendiary magistrate of the borough of Sheffield, adjudging Bernard Wake (the appellant) to pay to the mayor, &c., of the said borough (the respondents), acting as the urban sanitary authority for the district of the said borough, the sum of 74*l.* 1*s.* 3*d.*, and also an order of sessions made in confirmation of such order.

The facts are fully set out in the report of the case in the Queen's Bench Division (nom. *Ex parte Wake* (1)), and it is only necessary here to state the following:—

Wake was served in November, 1879, by the corporation of Sheffield with a notice under s. 150 of the Public Health Act, 1875, requiring him as owner of certain premises fronting Platt Street, within the said district, to sewer and level, &c., the said street in accordance with certain plans which were there referred to. Wake failed to comply with this notice. Thereupon the corpora-

(1) 11 Q. B. D. 291.

tion themselves executed the works at the cost of 340*l.* 1*s.* 8*d.*, and the proportion of this cost to be paid by Wake, as apportioned by the borough surveyor, and settled by an arbitrator according to the said Act, was 74*l.* 1*s.* 3*d.* Upon a summons obtained by the corporation to enforce payment of said sum, Wake appeared before the stipendiary and took the objection (inter alia) that the plans referred to in the notice of November, 1879, shewed that a considerable part of the contemplated works in respect of which the 340*l.* 1*s.* 8*d.* was expended by the corporation was executed upon land which formed no part of what was called Platt Street, but was private property, and therefore it was contended that there was no jurisdiction in the magistrate to enforce payment of the sum demanded. The magistrate overruled this objection, and made the order for payment. Wake appealed to the quarter session, when the recorder affirmed the order of the magistrate. A rule nisi for a certiorari to bring up the said orders of the magistrate and of the recorder was afterwards obtained, and the same was discharged by the Queen's Bench Division.

Wake appealed.

A. Charles, Q.C., and *C. Gould*, for the appellant. The jurisdiction of the magistrate to make the order must depend on whether the apportionment was null or not. Here the apportionment included money expended in respect of work done on what was no part of a street, and was therefore as much a nullity as the first apportionment in *Cook* v. *Ipswich Local Board.* (1) Although the principle on which the expenses have been apportioned cannot be questioned: *Nesbitt* v. *Greenwich Board of Works* (2); still, as said by Lord Blackburn in that case, "if the board exceeded its jurisdiction the apportionment is void"; and *Hesketh* v. *Atherton Local Board* (3) shews that an owner may dispute his liability on the ground that the street was a highway repairable by the inhabitants at large. The magistrate had jurisdiction to inquire whether the money expended by the local board was expended on a street, and where, as here, the money

(1) Law Rep. 6 Q. B. 451. (2) Law Rep. 10 Q. B. 465.
(3) Law Rep. 9 Q. B. 4.

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was expended on land which was not part of the street, the board had no power to order the sum so expended to be apportioned amongst the owners of premises fronting the street. *Hall* v. *Potter* (1) decided only that a notice to sewer and pave, &c., is not bad because it includes work to be done on land outside the jurisdiction of the board, if the work done by the board is confined to what is within their jurisdiction.

[BRETT, M.R. The board had to inquire whether the money was spent on works on the street, but if they came to a wrong decision, that was not a case of exceeding their jurisdiction, and the remedy of the appellant if aggrieved by their decision was to appeal to the Local Government Board.]

No doubt *Reg.* v. *Local Government Board* (2) is an authority that there might be such appeal under s. 268 of the Public Health Act, 1875, but there is nothing to shew that the appellant was bound to use that remedy, and that he could not also if he pleased object to the jurisdiction of the magistrate. Next, s. 150 states that the proportion of the expenses to be recovered summarily from the frontager is to be "settled by the surveyor of the urban authority, or, in case of dispute, by arbitration in manner provided by this Act," which is according to ss. 179 and 180. The justices are therefore only the tribunal for the recovery of these expenses where there is no dispute.

[BOWEN, L.J. The 150th section means that the urban authority may recover in a summary manner the expenses as the proportion is settled, whether by the surveyor or by arbitration.]

Sir F. Herschell, S.G. (*J. E. Barker* and *C. S. Hunter* with him.) The matter is left by the statute to the summary jurisdiction of the magistrate, and he has as much jurisdiction over it as a county court judge would have if the statute had said the expenses may be recovered in a county court. The magistrate may inquire, according to *Hesketh* v. *Atherton Local Board* (3), whether the street was a highway repairable by the inhabitants at large, and so he may also inquire whether the street was a street at all, and if he is wrong in point of fact an appeal will lie to the quarter sessions, but it cannot be said that he had no

(1) 39 L. J. (M.C.) 1. (2) 10 Q. B. D. 309.
(3) Law Rep. 9 Q. B. 4.

jurisdiction because in either of these cases he came to a wrong conclusion. The magistrate, however, could not inquire whether the money was entirely expended on the street. *Cook* v. *Ipswich Local Board* (1) is an authority for that. Then if he could not make that inquiry he was right in making the order for payment which he made. [He was then stopped by the Court.]

A. Charles, Q.C., replied.

BRETT, M.R. In this case everything which was done was intended to be done under the statute, which has pointed out the whole course of the procedure to be adopted. The statute has imposed on certain persons a liability not known to the common law, and has given to other persons powers and duties also not known to the common law; and it seems to me to follow that where that is the case, and where, as here, there is an Act of Parliament which has imposed a new liability, and given particular means of enforcing such new liability such mode of procedure is the only one to be followed and used for that purpose. In the present case, according to the course pointed out by the statute, the local authority is to find whether there ought to be the paving of a street and to determine what is the proper amount to be expended for that purpose. Afterwards that sum is to be laid not before the local authority but before the surveyor, to be apportioned by him amongst the different frontagers according to the measurement of their frontages, but without any power in such surveyor to inquire whether the expenditure of the money was a proper one or not. When this sum has been so apportioned by the surveyor the local authority is entitled to give notice of it to each of the frontagers and to demand of him the payment of his proportion as so apportioned, and if he does not comply with such demand the local authority is authorized by the statute to go before a magistrate and apply to him for an order for such payment. The person on whom the demand of payment has been made may say that the sum expended has not been rightly apportioned by the surveyor, but it is not necessary to determine what is his remedy in that case, beeause in the present case he does not find fault with the act of the surveyor but with the decision come to by the

(1) Law Rep. 6 Q. B. 451.

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local authority. The complaint is that although the local authority might properly have determined to pave the street and might properly have fixed the amount to be expended thereon, yet the sum expended was not on the street only but was partly on the street and partly on private land, and that therefore the decision of the local authority was wrong, that is to say, that it fixed a wrong sum to lay before the surveyor to apportion, because it had not confined the sum to that which had been expended on the street, but had extended it to a larger sum, part of which had been expended elsewhere than on the street. The complaint therefore, if anything, is that the appellant is aggrieved by the decision of the local authority, and consequently it comes within the exact terms of s. 268, which has pointed out the remedy the appellant has, namely, that in respect of that grievance he is to appeal to the Local Government Board. That is the particular remedy pointed out by the statute, and it being one for a grievance in respect of a new liability it is the only remedy which can be taken. If, therefore, the case was within the statute the magistrate, upon the summons before him for an order for payment, could not determine whether the decision of the local authority was right or wrong; but could only inquire whether the proper notice had been given, and if it had he could only make the order for payment. It was then said that the magistrate was bound to inquire whether the case was within the statute at all, and that if the local authority had assumed to cast a liability on a person to do that which was not within the Act, as to contribute to the expenditure of paving that which was not a street, and the magistrate found that that was so and that it was not within the Act at all, then he had no jurisdiction to make the order. But, on the other side, it was said that if the magistrate had jurisdiction to make that inquiry he had jurisdiction in the matter, and if he came to a wrong conclusion there was an appeal to the quarter sessions, but that there it must end, and there was no appeal from the sessions. Now it may be that the magistrate has power to inquire whether the case is within the Act at all, and if so, and he finds that it is not within the Act, it may be that he has no jurisdiction to make any further order. It may be that he is bound to make that inquiry, and that the only

appeal from the conclusion he may come to is to the quarter sessions, or it may be that he has no power to make such inquiry at all. It seems to me to be unnecessary to decide that matter, for even if the magistrate had jurisdiction to inquire whether the case was or was not within the statute at all, and if supposing it was not he had no jurisdiction to make any further order, I have come to the conclusion that this matter was not wholly without the statute. It would be without the statute if no order at all could have been made by the local authority, but if any part of the expenditure had been made in respect of a street within the meaning of the statute it is obvious that as to that part the local authority might fix the proper sum to be apportioned by the surveyor. Here it cannot be denied that a part of the expenditure was in respect of that which was a street within the meaning of the statute, and that the appellant was a frontager on that street, and it therefore follows that an order might be made upon him which would be an order within the meaning of the statute, and all that could be said against it would be that although it might lawfully be made it was a wrong order.

The case of *Cook* v. *Ipswich Local Board* (1) is an authority that where an order can be made, but it is a wrong order, it does not affect the jurisdiction but is only an error in judgment. The local authority had power to make an order, but they made a wrong order and that was a grievance which the magistrate could not set right, and he could do nothing more than make the order for payment which was applied for, because the decision of the local authority being within their jurisdiction was only erroneous, and the only remedy for the appellant was to appeal under s. 268 to the Local Government Board, who alone could set his grievance right.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors for appellant: *Geare & Son, for Wake & Sons, Sheffield.*

Solicitors for respondent: *Smith & Wilmer, for J. Yeomans, Sheffield.*

(1) Law Rep. 6 Q. B. 451.

W. P.

1883
Dec. 8.

[IN THE COURT OF APPEAL.]

IN RE E. F. HARDWICK, A SOLICITOR.

Solicitor—Summary Jurisdiction over—Appeal from Order striking off the Rolls—Judicature Act, 1873, *s.* 47.

When the High Court makes an order ordering a solicitor to be struck off the rolls for misconduct, it does so in exercise of a disciplinary jurisdiction over its own officers, and not of a jurisdiction in any criminal cause or matter within the meaning of s. 47 of the Judicature Act, 1873, and therefore an appeal lies from such order to the Court of Appeal.

THIS was an appeal by a solicitor from an order of the Queen's Bench Division, by which it was ordered that he should be struck off the rolls for misconduct. The case first came on before the Court of Appeal on the 30th of November and 1st of December last, when a preliminary objection having been taken by A. Wills, Q.C. for the Incorporated Law Society that no appeal would lie from such order, as it was made in a criminal cause or matter within the meaning of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47, the Court, on account of the importance of the point, desired that the case should be re-argued before the full Court of Appeal.

The case was reargued accordingly.

A. Wills, Q.C. (*Hollams*, with him), in support of this preliminary objection, cited *Oliver* v. *Lawrence* (1); *Re Gellibrand* (2); *Atcheson* v. *Everitt* (3); 3 Edw. 1, c. 29; 4 Hen. 4, c. 18; and 6 & 7 Vict. c. 73; 2 Coke's Institutes, cap. 29, pp. 213, 215; Comyns' Digest, tit. Attorney, B 15; Bacon's Abridgment, tit. Attorney H; Viner's Abridgment, tit. Attorney Q; *Re Mant* (4); *Re Blake* (5); *Jerome's Case* (6); Stephen on Criminal Law, c. i. p. 1.

Powell, Q.C. (*A. Powell*, with him), appeared for the appellant, but was not called upon.

(1) 2 Str. 946.
(2) 1 D. & R. 121.
(3) 1 Cowp. 382.
(4) 5 L. T. (N.S.) 254.
(5) 3 E. & E. 34; 30 L. J. (Q.B.) 32.
(6) Cro. Car. 74.

BRETT, M.R., delivered the following judgment of the Court. (1) 1883

IN RE HARDWICK.

The question as to the jurisdiction of the Court which has been raised in this case is one which might be of vital importance to the members of a great profession, and for that reason only, and not because we who had heard it on the first occasion had any difficulty about it, we desired to have the authority of the full Court for the decision. All the members of the Court of Appeal have now heard the argument in support of the objection to the hearing of that appeal, and they have no doubt as to the answer to be given. It is not necessary to comment on such argument, but it is sufficient to say that the whole Court is of opinion that the jurisdiction exercised in these matters by the High Court is a disciplinary jurisdiction over its own officers and not a jurisdiction in any criminal cause or matter. Therefore this Court has jurisdiction to hear this appeal.

The appeal was then heard, and after argument it was dismissed.

Solicitor for appellant: *E. F. Hardwick, in person.*
Solicitor for Incorporated Law Society: *Williamson.*

W. P.

[IN THE COURT OF APPEAL.] *Dec.* 19.

EX PARTE COBELDICK.

Solicitor—Delivery of Documents—Summary Jurisdiction.

The Court will not summarily order a solicitor to deliver up a deed to his client unless it be clearly shewn not only that his solicitor has no lien upon it, but that he is holding it for the applicant alone, and as his solicitor.

THIS was an appeal from the Queen's Bench Division which had refused an order ordering a Mr. T. Nicholls, a solicitor, to deliver up to the applicant, Mr. Reuben Cobeldick, a certain indenture of settlement dated the 17th of December 1875, which was made between Ann Cobeldick of the first part, the said Reuben Cobeldick of the second part, Mary Ann Cobeldick, of the third part, and Nicholas James and Michael Cayzer of the

(1) Brett, M.R., and Baggallay, Cotton, Lindley, Bowen, and Fry, L.JJ.

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fourth part. By this deed Ann Cobeldick granted and conveyed certain freehold lands to Nicholas James and Michael Cayzer for a term of 500 years on trust to raise 500*l.* for the applicant's sister Mary Ann Cobeldick, and subject thereto Ann Cobeldick conveyed the said lands to her son, Reuben Cobeldick, in fee. In support of the application for the delivery up of the deed, there was, inter alia, an affidavit by the applicant, that the deed had been prepared by Nicholls, who acted, it stated, at the time as his solicitor from instructions given to him by the applicant, who paid Nicholls' costs for preparing and completing it, and who afterwards entrusted the deed with Nicholls, with the concurrence of the applicant's sister, Mary Ann Cobeldick, now the wife of William Hortop, to keep for him the applicant as his solicitor. It was stated also on affidavit, that the applicant had applied to Nicholls for the indenture with the consent of his sister Mary Ann Hortop, and that the trusts created by it in her favour had been done away by a subsequent deed in which Nicholas James and Michael Cayzer had joined for the purpose of extinguishing the said trusts. In answer to this application T. Nicholls had written to say that he was instructed by N. James and M. Cayzer not to deliver up the indenture of the 17th of December, 1875, until they were released from the trusts of it by a separate document, and also from the trusts, if any, of a certain indenture of which they had no positive knowledge further than that at the applicant's request on some day unknown to them they had signed some deed, and also until their costs as trustees were paid.

C. Cavanagh, for the applicant, in support of the appeal. The solicitor gives no good reason for refusing to give up this deed to the applicant.

[BOWEN, L.J. Will the Court interfere in this summary way when a bonâ fide claim is set up? Will not the Court always in such case leave the applicant to his remedy by action?]

In *Re Emma Silver Mining Co., In re Turner* (1), Malins, V.C., ordered solicitors to deliver up to their clients all the documents of their clients in their possession, as they had been paid all their costs in respect of which they had any lien, and such order was

(1) 24 W. R. 54.

made notwithstanding it was stated that other persons were interested in some of the documents and claimed delivery of them.

[Bowen, L.J. There the claim was obviously unwarranted.]

So here, also, the claim is an unwarrantable one.

[The cases of *Re Walmsley* (1), and *Hotham* v. *Somerville* (2), were referred to.]

Brett, M.R. This is an application which can only be justified on the ground that the solicitor is holding a deed which belongs to the applicant, and which he is holding for the applicant without having any lien or claim on it of his own. Now what is shewn in support of this application is that the deed which it is asked shall be delivered up was drawn by the solicitor on the instructions of the applicant, but it is not shewn to be a deed which was wholly for the applicant, for, on the contrary, it appears to be one in which an interest is given to other parties. It is true that it is shewn that the solicitor has been paid for preparing the deed, and that he has no lien on it, but it is not clearly made out that he is holding it for the applicant alone and as his solicitor.

For these reasons I am of opinion that this application must be refused.

Bowen, L.J. This is an application to the summary jurisdiction of the Court over a solicitor, in order to compel the discharge by him of his duty to his client. Now it is not shewn, as it ought to have been in support of such an application, that the relation of client and solicitor ever existed quoad this document. All that has been shewn has been a case in which the party ought to establish his right by an action at law, and not by appealing to the summary jurisdiction of the Court.

Rule refused.

Solicitors for applicant: *Emmett, Son, & Stubbs.*

(1) 2 Ad. & E. 575. (2) 5 Beav. 360.

W. P.

1884
Jan. 17.

PONTIFEX *v.* FOORD.
MEAD, THIRD PARTY.

Practice—Third Party Procedure—Order XVI. rr. 48, 52—*Contribution or Indemnity.*

The plaintiff sued the defendant for breach of a covenant to repair contained in a lease of a dwelling-house for a term of twenty-one years from Michaelmas, 1861. The defendant obtained leave to serve and served a third party notice claiming contribution or indemnity from a sub-lessee to whom he had let the premises from Midsummer, 1869, for the remainder of the original term less ten days. The underlease contained a covenant to repair, which was in terms precisely similar to those of the covenant in the original lease, and for breach of which the defendant claimed relief against the sub-lessee :—

Held, that, inasmuch as the terms of the covenant to repair must in each case be construed with reference to the age and character of the premises at the time of the demise, the covenant in the underlease could not be construed as a covenant to indemnify the defendant against or to perform the covenant in the original lease; that the defendant's claim was not one for contribution or indemnity from the third party within Order XVI., rule 52, and that, therefore, no directions as to trial could be given under that rule.

APPEAL from the decision of Field, J., at Chambers, refusing to give directions under Order XVI., rule 52, for trial of questions between the defendant and the third party. The action was by lessor against lessee for breach of covenants to repair, &c., contained in a lease. The defendant had under Order XVI., rule 48, obtained leave from a Divisional Court, upon appeal from a judge at chambers, to serve and had served a third party notice upon one Mead, who had been a sub-lessee of the demised premises from the defendant. It appeared that the plaintiff had demised a dwelling-house to the defendant for a term of twenty-one years from Michaelmas 1861. The lease contained covenants by the lessee in usual terms to keep and leave the demised premises in repair; also to paint, paper, and whitewash the interior of the premises once in every seven years of the term, and to paint the exterior once in every fourth year of the term.

The defendant occupied the premises until Midsummer, 1869, and then sub-let them to Mead from that date for the residue of the term less ten days. Mead entered and occupied till the end of his term, and then gave up possession to the defendant. The under-

lease contained covenants by the sub-lessee to keep and leave the premises in repair in terms identical with those of the covenants to keep and leave in repair contained in the original lease, and also covenants to paint, paper, and whitewash the interior once in the first six years, and once in the last seven years of the term, and to paint the exterior before the 29th of September then next, and in every fourth year of the term from that day, but there was no covenant by the sub-lessee to indemnify the lessee against the covenants of the original lease. The defendant claimed over against the third party for contribution or indemnity on the ground that he had broken the covenants to repair, &c., in the underlease. The third party having appeared, an application was made by the defendant for directions, under Order XVI., rule 52, which the Master referred to the judge. Field, J., at chambers refused to make any order, on the ground that the case not being one of a claim for contribution or indemnity was not within the rules as to third party procedure. Against this decision the defendant appealed.

W. J. Brooks, for the defendant. It is obvious, having regard to the terms of the covenants in the sub-lease, that it was intended that the sub-lessee should be bound to repair at the same time and to the same extent as the lessee. If so the covenants amount to covenants to fulfil the obligations of the original lease, and so they are substantially covenants to indemnify: *Hornby* v. *Cardwell.* (1)

[POLLOCK, B. That does not seem to me to be the true construction of the underlease in this case. The words of the covenant may be identical, but the measure of damage is not necessarily the same. The character and age of the house are different when the underlease commences from what they were when the original lease commenced.]

Even if the measure of damage were different, the defendant would be entitled to recover some portion of the damages recovered against him by the plaintiff from the third party. Giving a reasonable interpretation to the words, this may therefore be said to be a claim for contribution. The words of rule 52

(1) 8 Q. B. D. 329.

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are "contribution or indemnity in whole or in part." Upon proper pleadings between the defendant and the third party the questions as between the defendant and the third party could be determined in the same action. The plaintiff could not be prejudiced, and the intention of the rules is that so far as possible all questions arising out of the same subject-matter should be disposed of by one trial. If the rule as to bringing in third parties is to be limited to cases of indemnity and contribution in the strictest technical sense of those terms, its application will be very much narrowed. The intention with which the third party procedure was framed was to prevent the scandal of different juries returning inconsistent verdicts with regard to the same question. Such a result might happen in cases like the present as well as in cases of contribution and indemnity more strictly so called. A question here is what it would take to put the house into repair. One jury might say £500, another £300. The questions involved here are whether the house is out of repair, how much it would cost to put the house into repair, how much the defendant ought to pay towards the repair, and how much the third party ought to pay. All these questions could conveniently be determined at one trial. [He also cited *Benecke* v. *Frost.* (1)]

Aspland, for the third party. The third party procedure under the new rules is confined to cases of "contribution" and "indemnity." This is not a case of "contribution" claimed from the third party. "Contribution" is between co-sureties or joint contractors. The term is not applicable in the case of two wholly independent contracts. The questions as between the plaintiff and defendant, and as between the defendant and the third party in the present case, are quite different. The existing rule is not intended to combine together two trials of different matters, but to provide that when one trial may decide the same question both as between plaintiff and defendant, and as between the defendant and the third party it should do so. It is clear also that this is not a case of "indemnity" claimed from the third party: *Logan* v. *Hall.* (2) The case of *Hornby* v. *Cardwell* (3)

(1) 1 Q. B. D. 419. (2) 4 C. B. 598.

(3) 8 Q. B. D. 329.

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when examined is an authority against the defendant, because the ground of the decision was that there was in that case a contract to indemnify.

[He was then stopped by the Court.]

Muir McKenzie, for the plaintiff, was not called on to argue.

POLLOCK, B. The language of the new rules on the subject of third party procedure differs from that of the old rules. Under the old rules, Order XVI., rule 17, it was provided that, wherever a defendant was or claimed to be entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appeared to the Court or a judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the Court or a judge might, on notice being given to such last-mentioned person, make such order as might be proper for having the question so determined. The working of this rule gave rise to great practical difficulties, and in the present rule, that is Order XVI., rule 48, we find that the language is different, some of the words of the old rule being left out and the provision being confined to cases where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action. Leave having been given to issue and serve the third party notice, when the case comes before the judge on a summons for directions under Order XVI., rule 52, the judge before giving such directions must by the terms of the rule be satisfied "that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed in whole or in part." The words "in whole or in part" were relied on by the defendant's counsel, but it does not seem to me that they can alter the meaning of the words "contribution or indemnity." There may be a claim for contribution or indemnity as to the whole or part of the matters in respect of which the plaintiff claims, but the claim must be for contribution or indemnity in order to come within the rule. The case of *Hornby* v. *Cardwell* (1) was relied upon by the

(1) 8 Q. B. D. 329.

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defendant's counsel, but when that case comes to be looked at, the view taken seems to have been that the covenant there was substantially a covenant to indemnify, because the sub-lessee had contracted to perform the covenants of the original lease. It does not appear to me to be so in the present case. It is common knowledge that, where there is a covenant to repair such as those contained in this lease and sub-lease, and a surveyor is called in to make an estimate of the damages arising from non-fulfilment of the covenant, the first question he goes into is as to the character and age of the house when the tenancy commenced. The principle involved is clearly explained in *Logan* v. *Hall* (1) and in *Payne* v. *Haine* (2), cases which indicate the varying effect of covenants using the same words according as the words are to be applied to an old or a new house. It seems to me that this is no case of contribution or indemnity, and therefore that the learned judge was right in refusing to give directions, and that this appeal must be dismissed. In coming to this conclusion, I do not think we are in any way overruling the decision of the Divisional Court which gave leave to serve the third party notice. It may be that there was a primâ facie case made out for allowing the defendant to serve the notice, but when it comes to be a question of directions, we must then be satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed.

LOPES, J., agreed.

Appeal dismissed.

Solicitors for plaintiff: *Pontifex, Hewitt & Pitt.*

Solicitors for defendant: *Reeves*, for *Sedgwick, Turner & Walker.*

Solicitors for third party: *Young & Sons.*

(1) 4 C. B. 598. (2) 16 M. & W. 541.

E. L.

THE WEST LONDON COMMERCIAL BANK, LIMITED *v.* KITSON, PORTER, AND WOODWARD.

1883
Dec. 5.

Company—No Power to accept Bills—Acceptance by Directors "for and on behalf" of Company—Personal Liability.

A bill of exchange payable to order and addressed to the B. and I. Company, which was incorporated under local Acts, and had no power to accept bills, was accepted by the defendants, two of the directors and the secretary of the company, as follows: —"Accepted for and on behalf of the B. and I. Company, G. K., S. F. P., directors; B. W., secretary." The acceptance was in pursuance of a resolution by the company that the bill should be accepted on account of professional services rendered to it by the drawer, who was told when he received the bill that it was given to him on the understanding that he should not negotiate it, and merely as a recognition of the company's debt to him, as the company had no power to accept bills. The bill was indorsed to the plaintiffs for value, and without notice of the understanding between the drawer and the defendants:—

Held, that upon the dishonour of the bill the defendants were personally liable. By Day, J., on the ground that the defendants as between themselves and the plaintiffs had been guilty of constructive fraud by issuing a bill which contained an untrue statement that they were authorized to accept it on behalf of the company, or upon the ground that, apart from fraud, they were, as between themselves and a bonâ fide indorsee for value, precluded from denying the truth of any statement contained in their acceptance of a negotiable instrument. By A. L. Smith, J., on the ground that there was evidence of an implied contract by the defendants with the plaintiffs that they were authorized to accept the bill on behalf of the company.

ACTION by the plaintiffs as holders of a bill of exchange for 400*l.* accepted by the defendants, and in the alternative to recover damages for misrepresentation by the defendants that they had power to accept bills for and on behalf of the Brentford and Isleworth Tramways Company.

The Brentford and Isleworth Tramways Company was incorporated under 42 & 43 Vict. c. ccvii. and 43 & 44 Vict. c. cxcvi., for the purpose of constructing new tramways in Middlesex. The defendants Kitson and Porter were directors, and the defendant Woodward secretary of the company. In November, 1881, the company was in pecuniary difficulties, being largely indebted to the contractor for the works of the undertaking, and also to one Ashdown, the engineer who had superintended the

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works. The defendants and other directors had assisted the company by making advances and accepting bills for its benefit. On the 9th of November Ashdown requested the defendants as directors and secretary of the company to accept a bill for 400*l.* on account of his claim for professional services in order that he might raise money on it from his father-in-law. The defendants accepted the bill accordingly, but they did not communicate with his father-in-law, nor take any steps to restrain the negotiation of the bill beyond telling Ashdown when they gave it him that they did so on the understanding that he should not negotiate it, and only as a recognition of the company's debt to him, as the company had no power to accept bills. The bill was drawn by Ashdown, directed to the Brentford and Isleworth Tramways Company, and the acceptance was as follows:—

"Accepted, payable at Messrs. Hull, Smith, Woodbridge, & Co., Bank, Brentford, for and on behalf of the Brentford and Isleworth Tramway Company.

"Geo. Kitson,
S. F. Porter, } Directors.

"B. Woodward, Secretary."

Ashdown indorsed the bill to the plaintiffs for value, representing that it was a good trade bill, and they took it upon the faith of these representations. The bill when due was presented for payment, and was dishonoured. The plaintiffs commenced an action against the company, which was defended on the ground that it was beyond the power of the company to accept bills, and that they were not liable upon the acceptance. The defendants accepted the bill with knowledge that the company had no power to accept bills and of the risk that if Ashdown did not keep faith with them the bill might be put into circulation and pass into the hands of a holder for value.

The question was whether the defendants were liable upon the bill, or liable to any amount in respect of either of the alternative causes of action.

F. Turner, for the plaintiffs. The defendants are liable either as virtual acceptors of the bill, or upon an implied warranty that they had authority from the company to accept it. The cases

following *Randell* v. *Trimen* (1) shew that the belief of the defendants in the truth of their representation is immaterial.

[He was stopped.]

Terrell, for the defendants. The acceptance of the bill by the defendants on behalf of the company is no ground for making them personally liable. It is not a misrepresentation of any fact. There is no untruthful statement that the defendants are the authorized agents of the company to accept bills, but merely a statement that the company have power to accept bills. This is a misrepresentation of law, the facts as to the constitution of the company being within the cognizance of all, and such a misrepresentation of law is no ground of action: *Beattie* v. *Lord Ebury* (2). *Beattie* v. *Lord Ebury* (2), where the account of a company without the necessary borrowing powers was overdrawn, and the directors were held not liable on their letter requesting the bank to honour cheques in a specified form, is stronger than the present case, for there the request was express and here the representation can only be implied.

Secondly, the plaintiffs as indorsees are in no better position than the drawer. The defendants had been assured that the bill would not be negotiated and they were not bound to take further steps to prevent it from getting into circulation.

F. Turner, in reply. In *Beattie* v. *Lord Ebury* (2) the Court held that the letter contained no warranty that the company had power to overdraw their account or to borrow money. Here the case is different, for the bill is worthless unless the defendants are authorized to bind the company.

DAY, J. I am of opinion that the plaintiffs are entitled to judgment. The action is brought by the plaintiffs as indorsees and holders of a bill of exchange accepted by the defendants, or, in the alternative, to make them liable upon a warranty or fraudulent representation that they had authority to accept the bill so as to bind the Brentford and Isleworth Tramways Company. The bill not being addressed to the defendants they cannot be liable as acceptors. I do not think that there is evidence of a warranty,

(1) 18 C. B. 786.

(2) Law Rep. 7 Ch. 777; per Mellish, L.J., at p. 800; 7 H. L. 102.

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and with regard to a fraudulent representation I have some difficulty, owing to the mode in which the case is stated. To support an allegation of fraud proof must be given of a false statement by the defendants with the intention that it should be acted upon. In the case before us no false statement was made expressly: between the defendants and Ashdown there was no such statement, and at the time of the acceptance he seems, so far as I understand, to have been told that the company had no power to accept bills; but it may be said that although Ashdown knew the real facts the indorsees took the bill in ignorance of them, and can take advantage of any representation to be implied from the acceptance, notwithstanding the statement that when the defendants gave the bill they told Ashdown that they did it on the understanding that he should not negotiate it, although it also appears that the bill was given to Ashdown with the intention that he should raise money upon it. If however, as between the defendant and Ashdown one legal element of fraud is wanting, I am prepared to hold that as between the defendants and the indorsees there was constructive fraud by putting into Ashdown's hands a worthless piece of paper which purported to be the acceptance of a bill, and so causing it to be indorsed to the plaintiffs. But I am not compelled to base my decision on this ground exclusively, for I think that it can be supported on the ground that the defendants made by implication a false representation upon the face of a negotiable instrument which the plaintiffs are entitled to have made good, and that the defendants are bound by this representation, as between themselves and an indorsee for value without notice. The representation that the acceptance of this bill of exchange was valid is a compound representation. It is a representation that the defendants had the company's authority to accept the bill and that the company had power to accept bills. So that there is a representation as to a fact as well as a representation which is only equivalent to a legal opinion. No case has been cited to shew that the representation as to the matter of fact cannot be the subject of an action, and *Beattie* v. *Lord Ebury* (1) has no application, for it turned upon the construction of a letter giving notice of the form

(1) Law Rep. 7 Ch. 777; 7 H. L. 102.

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in which the company's cheques would be drawn. So that we have a representation false to the knowledge of the party making it, and only not fraudulent because of the finding that the bill was not intended to be negotiated. In spite of the statement in the case that the bill was not intended to get into the hands of third persons, I think the representation in the acceptance must be taken to have been made with the intention that it might be acted upon, and that the defendants are liable to any one who has acted upon this representation.

A. L. SMITH, J. I have had considerable difficulty in this case, and my mind is not free from doubt, but I have come to the conclusion that the plaintiffs are entitled to judgment, though I cannot put it entirely upon the ground taken by my Brother Day. The first point is, what was the representation made by the acceptance of the defendants? It seems to me that when they say "We accept this bill for and on behalf of the Brentford and Isleworth Tramways Company," this is a representation that they have authority to accept the bill for and on behalf of the company. It is urged that they could have had no authority to accept the bill for the company inasmuch as the company had no power to accept bills, but this seems not to affect the fact of their representation. Taking this view, I think the present case is distinguishable from *Beattie* v. *Lord Ebury*. (1) There the document was simply this: "Please to honour the cheques of this company signed by two of the directors and counter-signed by the secretary," and it was contended that the effect of this document was that whenever the account was overdrawn the company had authorized the defendants to overdraw the account. And Mellish, L.J., in the Court of Appeal, says that the misrepresentation as to the power of the company to overdraw was a misrepresentation of law and not of fact. Here I think there is evidence that these three gentlemen represented that they had in fact authority to accept the bill on behalf of the company, and that the plaintiffs can take advantage of their representation. They have accepted a bill payable "to order," and put it in the hands of the drawer for the purpose of enabling him to

(1) Law Rep. 7 Ch. 777; 7 H. L. 102.

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raise money upon it, with full knowledge of the risk that if he did not keep faith with them the bill would be put into circulation. I think, therefore, that it is competent for a bonâ fide indorsee of this bill, who has taken it upon the faith of these representations, to bring his action against the defendants upon a contract that they had authority to accept it. The case is an exception to the rule that an action can only be brought upon an instrument by a person who is a party to it, and is more like the cases of a reward offered by advertisement to any person giving information, or time tables published by a railway company informing any passenger that a train will run at a particular time. Solely for this reason I think the plaintiffs entitled to judgment.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Shaw & Co.*
Solicitor for defendants Kitson and Porter: *G. F. Jones.*

A. P. S.

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Jan. 24.

HUNT AND ANOTHER *v.* FENSHAM AND WIFE.

Debtor and Creditor—Execution—Sale by Sheriff—Application ex parte to sell Goods by Private Contract—Discretion—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52) *s.* 145.

Under s. 145 of the Bankruptcy Act, 1883, the Court has a discretion to order goods taken in execution by the sheriff to be sold by private contract instead of by public auction, notwithstanding that the application for leave to sell by private contract is made by the execution creditor ex parte, and in the absence of all the other creditors of the execution debtor.

APPLICATION, ex parte, on behalf of the plaintiffs, execution creditors, made under s. 145 of the Bankruptcy Act, 1883 (1), to sell the goods of the execution debtor by private contract instead of by public auction.

(1) S. 145. "Where the sheriff sells the goods of a debtor under an execution for a sum exceeding 20*l.* (including legal incidental expenses), the sale shall, unless the Court from which the process has issued otherwise orders, be made by public auction, and not by bill of sale or private contract, and shall be publicly advertised by the sheriff on and during three days next preceding the day of sale."

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The affidavit in support of the application stated the following facts: On the 17th of January, 1884, the plaintiffs recovered judgment against the defendant, Maria Fensham, for a sum of 104*l.*, and on the same day the sheriff of Middlesex, acting under a writ of fieri facias issued upon that judgment, seized the stock-in-trade, household furniture and effects of Maria Fensham in and about a public-house at Kingsland, in Middlesex, in which Maria Fensham and her husband carried on the business of licensed victuallers. The defendant Maria Fensham was possessed, for her separate use, of a lease of the house for a term of which about fifteen years remained unexpired, and of the goodwill of the business, and the stock-in-trade, furniture and effects taken in execution. The lease was subject to a mortgage and two further charges granted by the defendants to secure the repayment of sums of 500*l.*, 800*l.*, and 800*l.* respectively.

The affidavit also stated that it would be to the interest of Maria Fensham, and of the plaintiffs, and of the mortgagees, that the sheriff should sell the goods by private contract instead of by public auction, and that the goods, which were stated to be of the value of 150*l.* at the least, would realize a much greater sum if sold by private contract than they would realize if sold by public auction.

Mathew, J., in chambers refused the application, being of opinion that it ought not to be granted in the absence of the other creditors of the execution debtor.

Macaskie, for the plaintiffs, in support of the application.

POLLOCK, B. I think the application is a reasonable one, and should be granted. Sect. 145 of the Bankruptcy Act, 1883, has varied the statutory course with respect to sales by the sheriff, and has provided that in certain cases the goods seized in execution shall be sold by public auction unless the Court from which the process has issued "otherwise orders." No doubt the legislature intended that in exercising the power given by the section the Court should act for the benefit of all parties, and come to a conclusion, upon evidence of the particular circumstances existing in each case, whether the goods ought to be sold in one way or

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the other. It is said that leave to sell by private contract ought not to be given in the absence of the other creditors, as their interests might thereby be prejudiced; but it is difficult to see why in the great majority of cases that which is best for one would not be best for all. If, however, a creditor should object to a sale by private contract, as might possibly occur where the other creditors were few in number and the interest he represented was not his own, it would always be open to him by a substantive application to ask the Court to vary the order.

LOPES, J. It seems to have been thought that the legislature intended that the general body of creditors should be before the Court when there was an application for leave to sell by private contract under s. 145 of the Bankruptcy Act, 1883. The inconvenience would be enormous if that construction were adopted. I am of opinion that the legislature contemplated cases in which it would obviously be more advantageous to the creditors and all parties that the goods should be sold by private contract; and intended that in those cases the Court might order a sale by private contract upon the application of any creditor.

Application granted.

Solicitors for plaintiffs: *Mackeson, Taylor, & Arnould.*

W. A.

[IN THE COURT OF APPEAL.]

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Jan. 24.

JACQUES *v.* HARRISON.

Practice—Setting aside Judgment—Application by a Person not party to the Record—Judicature Act, 1873, *s.* 24, *sub-s.* 5—*Order XXVII., rule* 15.

If a person, who is not a party to the record, seeks to set aside a judgment by which he is injuriously affected, which the defendant in the action has allowed to go by default, he ought by summons, taken out in the name of the defendant, or if not entitled to use the defendant's name, then taken out in his own name, but in that case served on both the plaintiff and the defendant, apply for leave to have the judgment set aside, and to be allowed either to defend the action on such terms of indemnifying the defendant as the judge may consider right, or to intervene in the action in the manner pointed out by the Judicature Act, 1873, s. 24, sub-s. 5.

Order XXVII., rule 15, is designed to enable judgments by default to be set aside by those who have or who can acquire a locus standi, and does not give a locus standi to those who have none.

APPEAL by the plaintiff from an order of the Queen's Bench Division (ante, p. 136), setting aside the judgment by default which had been signed by the plaintiff.

The action was one of nine actions brought by the plaintiff against the same defendant for the recovery of land for forfeiture by breach of covenants in a building lease which had been granted to the defendant. The lease had been deposited by the defendant with the North London Freehold Land Society, who advanced a large sum of money on the security of such lease, and the defendant having afterwards no interest in the matter allowed judgment to go against him by default, and a writ of possession to issue under which the plaintiff took possession. The society, who were the equitable mortgagees of the lease, went into liquidation before the plaintiff's action was brought, and the official liquidator did not interfere in the matter until the writ of possession had been issued, when he caused proceedings to be taken in the Chancery Division to set aside the forfeiture, on the ground that no proper notice under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14, had been given by the plaintiff before the action was brought. Bacon, V.C., before whom the matter came, considered that the judgment

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ought to be set aside, as for want of such notice there was a defence to the action, but that he had no power to set aside the judgment, and that the application for that purpose should be made to the Queen's Bench Division. He however ordered, on payment of the ground rents, and an undertaking by the official liquidator to complete the buildings, that possession should be given to such liquidator as representing the equitable mortgagees.

An application by summons was accordingly made to Field, J., at chambers, for an order to set aside the judgment; but such summons was taken out by the official liquidator in his own name without making the defendant a party to it, and therefore Field, J., dismissed the application as it was made by a stranger to the action. The Queen's Bench Division reversed this decision, and set aside the judgment on the ground that they had power to do so under Order XXVII., rule 15 (1), as that rule gave the official liquidator a locus standi. The plaintiff appealed.

Phipson Beale, and *J. E. Bankes*, for the plaintiff.

A. Wills, Q.C., and *Beaumont*, for the respondent the official liquidator.

Cur. adv. vult.

Jan. 24. The judgment of the Court (Brett, M.R., and Bowen, L.J.) was delivered by

BOWEN, L.J. In this case (and we hope and believe in many others) the Court is fortunately able to cure the slips and errors that have been made in practice upon terms which will prevent the possibility of injustice, and will place the parties in the position in which they would have stood and ought to have stood but for technical mistakes.

The plaintiff has sued the defendant in an action for recovery of certain lands and premises based upon forfeitures arising out of the defendant's breach of two covenants in his lease. The

(1) Order XXVII., r. 15: "Any judgment by default, whether under this order or under any other of these rules, may be set aside by the Court or a judge upon such terms as to costs or otherwise as such Court or judge may think fit."

persons really interested in the premises are not the defendant, but his equitable mortgagees, who not being in possession, were not made parties to the action. The defendant accordingly having no interest in the litigation allowed judgment to go against himself by default, and a writ of possession to issue, under which the plaintiff has taken possession of the premises claimed. It appears, however, that if the defendant had chosen to defend, or if the respondent in this appeal, who represents his equitable mortgagees, had intervened and undertaken the defence, the plaintiff, who appears not to have served on the defendant the notice required by s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), would in all probability have had no right to recover. Owing to a few days delay the respondent unfortunately failed to intervene till judgment had been actually signed against the defendant and possession given. He is, however, interested in the matter, or is affected by the judgment, which so long as it stands is a blot upon the title of the mortgagees, and it cannot be doubted, on the materials at present before us, that he would be entitled, even at this late stage, to have the judgment set aside, and to have liberty, on reasonable terms, to defend the action, provided he had taken the proper steps for that purpose, or even if any technical omission of which he has been guilty can be cured.

The power of the Court to rectify bonâ fide slips does not, however, as it appears to us, dispense with the necessity of pointing out what was in such circumstances the proper practice to be followed; especially as it is one that in our opinion is based, not on any mere formal rule, but on the strict requirements of justice.

There are, so far as we can see, only two modes open by which a stranger to an action, who is injuriously affected through any judgment suffered by a defendant by default, can set that judgment aside; and these two modes are amply sufficient to protect any such stranger in all cases in all his rights. He may, in the first place, obtain the defendant's leave to use the defendant's name, if the defendant has not already bound himself to allow such use of his name to be made; and he may thereupon, in the defendant's name, apply to have the judgment set aside on such

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terms as the judge may think reasonable or just. Or he may, if he is not entitled without further proceedings to use the defendant's name, take out a summons in his own name at chambers to be served on both the defendant and plaintiff, asking leave to have the judgment set aside, and to be at liberty either to defend the action for the defendant on such terms of indemnifying the defendant as the judge may consider right, or, at all events, to be at liberty to intervene in the action in the manner pointed out by the Judicature Act, 1873, s. 24, subs. 5.

By one or other of these two modes all that justice requires in any case can be done. But it is of the essence of the intervention of the third person, if he adopts the latter course, that the defendant should be made a party to the application. This is not a mere form, but an essential requirement of justice. The defendant has thought it more consistent with his own interest to submit at once to the plaintiff's claim instead of contesting it further. If at the instance of a stranger to the action the litigation is sought to be revived, the defendant has a right, in the first place, to dispute the title of the applicant to interfere. He has no opportunity of doing so unless he is made a party to the summons. In the second place, he has a right to be heard upon the question whether, if a litigation is to be prolonged against himself in invitum which he desired to have closed by his submission, he should not be indemnified against any risks or costs to which he may be otherwise exposed by its prolongation. Until the applicant has made the defendant a party to the application by service upon him of the summons, the applicant remains a mere stranger to the action.

The plaintiff, moreover, is interested in seeing that what the applicant proposes to do should be done in a way which binds the defendant when he is sued. In what position would the plaintiff otherwise be placed? His judgment against the defendant having been set aside by a mere stranger, such stranger, unless made a party to the action, might content himself by retiring once more into the background. What could the plaintiff do? Sign judgment against the defendant again, unless the stranger took the opportunity of the interval to intervene in the action in proper form? If so, from whom could he recover the

added costs? On the other hand, he could not proceed with the action without an antagonist to fight with, and one who would be responsible for costs in case of failure. The plaintiff is on his side, therefore, interested in seeing that what is done shall be done upon terms which give him a substantial antagonist, by whose revived defence of the action the defendant shall be bound, and to whom the plaintiff may look for his costs; otherwise he is called upon to fight against a shadow. But these terms cannot be settled unless the defendant is made a party to the application.

Unfortunately the present respondent did not pursue either of these necessary courses. He took out, as he had a right to do, a summons in his own name against the plaintiff, asking to set aside the judgment, but did not make the defendant a party. He was, no doubt, misled into this irregularity by the conduct of the defendant, who, in a previous proceeding before Bacon, V.C., had intimated that he did not intend to trouble himself further in the matter. But the defendant's language in a Chancery action did not dispense with the necessity of making him a party to any application made in the action in the Queen's Bench Division in which he was the defendant on the record. He had a right to change his mind. He had a right, moreover, to be heard as to being indemnified in his own action. On the hearing of the summons, to which he was not a party, Mr. Justice Field might no doubt have adjourned the summons for his attendance, or adopted some means of protecting him in his absence. It does not appear that the learned judge was asked to do so, and as the respondent only could obtain a locus standi by means of service on the defendant or notice to him of this application, and as such service or notice on the very face of the summons had not been given, Mr. Justice Field, in conformity with the practice and with law, dismissed the summons on the ground that the respondent was a mere stranger as yet to the action.

Against Mr. Justice Field's decision the respondent appealed to the Divisional Court without curing the blot manifest on the very face of that application.

The Divisional Court decided in his favour, reversing the judgment of Field, J., on the ground that Order XXVII., r. 15,

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gave the respondent a locus standi. Strictly speaking we should have been disposed to think that this decision was incorrect as a matter of practice and a misconception of the effect of the rule, which was not designed to give a locus standi to persons who had none, but to enable judgments by default to be set aside on terms by those who had or who could acquire a locus standi. Probably no substantial injustice was done. It is all but certain that the defendant does not care to interfere. But this is a surmise only, and, as a matter of practice, it is difficult in technical strictness to justify an order made at the instance of a stranger that affects the possible rights of a defendant on the record who has not been made a party to the application, and whose rights are not protected by the order.

Then comes the appeal to this Court. The blot in the proceedings of the respondent still remains uncured. What is to be done? It would be a grave pity if all these proceedings were to be rendered abortive for the sake of protecting the interests of an absent person who may not after all care to be protected. It seems to us that the proper course to pursue is, while recognising the error in practice that has occurred, to mould the order of the Court below in such a way as will prevent the possibility of injustice, and preserve to the defendant an opportunity even now of being heard if he desires to claim it.

It remains to be considered what terms should be imposed upon the respondent as to the costs already incurred or thrown away. The issue of nine writs by the appellant instead of one appears to us to have been wholly unjustifiable, as the Court of Queen's Bench have pointed out. The judgments and writs of possession should therefore be set aside on the payment by the respondent of the costs of one judgment and one writ of possession.

The question of the costs of this appeal and of the proceedings below is more difficult. The respondent has been technically wrong throughout. On the other hand, the appellant has availed himself of the blot in the respondent's proceedings, not for the purpose of insisting that it should be cured in the proper way, but for the purpose of insisting on terms which were exaggerated and which he never could have obtained. In our opinion the

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nearest approach to justice that can be made is to make the costs of this appeal and of the proceedings below fall upon the appellant. The following is therefore the order which we consider the Court of Appeal should now make:—

Judgments by default and writs of possession to be set aside on payment of costs hereinafter mentioned, and respondent to be at liberty to defend the action in the defendant's name. Notice to be served forthwith by respondent on defendant, who is to be at liberty to apply to vary or discharge this order: costs of setting aside one judgment and one writ of possession to be paid by the respondent; costs of appeal and of the proceedings below to be paid by the appellant; other costs, if any, reserved. Liberty to all parties to apply.

Order accordingly.

Solicitors for appellant: *Learoyd & Learoyd.*

Solicitors for respondent: *Trollope & Winckworth.*

W. P.

THE CREDITS GERUNDEUSE, LIMITED *v.* VAN WEEDE.

Feb. 9.

Practice—Interpleader—Service out of the Jurisdiction—Ord. LVII.

Where the plaintiffs sued for goods in the possession of the defendant, and it appeared that a foreigner residing out of the jurisdiction claimed the right to the same goods and would probably sue the defendant in respect of them, the Court gave the defendant leave to serve an interpleader summons out of the jurisdiction upon the foreigner.

The effect of service out of the jurisdiction in such a case is to give the foreigner notice of the proceedings within the jurisdiction, so that he may appear and prosecute his claim, or, if he does not appear, so that any future claim prosecuted by him against the defendant in respect of the subject-matter of the action within the jurisdiction may be barred.

APPLICATION for leave to serve a copy of an interpleader summons, obtained under Order LVII., out of the jurisdiction.

The facts are sufficiently stated in the judgment.

J. G. Barnes, in support of the application, cited *Stevenson* v. *Anderson* (1); *Patorni* v. *Campbell* (2); *Webster* v. *Delafield* (3);

(1) 2 V. & B. 407. (2) 12 M. & W. 277.

(3) 7 C. B. 187.

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CREDITS GERUNDEUSE v. VAN WEEDE.

Attenborough v. *London and St. Katharine's Dock Co.* (1); *Belmonte* v. *Aynard.* (2)

Cur. adv. vult.

Feb. 9. The judgment of the Court (Pollock, B., and Lopes, J.) was delivered by

POLLOCK, B. This was an application on behalf of Van Weede, who is defendant in an action at the suit of the Credits Gerundeuse, Limited, for leave to serve a copy of an interpleader summons upon one Don Pedro Jordi, a Spanish subject now at Gerona, in Spain.

The plaintiffs by their statement of claim alleged that the defendant was the bailee and London agent for the sale of 320 bales of cork, the property of Don Pedro Jordi of Palafurgill, in Spain, who sold and transferred the property in them to the plaintiffs; that due notice thereof was given by him and by the plaintiffs to the defendant; that the plaintiffs demanded the said goods from the defendant, but that the defendant refused to deliver them to the plaintiffs or their agent.

The application was supported by the affidavit of the defendant which stated that there are now in his hands certain corks, being a portion of the consignments sent to him by Jordi, and that in July, 1883, he received a letter from Messrs. Aynard & Ruffer of Lombard Street, who claimed the corks, the subject-matter of the action, on behalf of the plaintiffs under an assignment purporting to have been made by Jordi to the plaintiffs, and that, after becoming acquainted with the facts and having taken counsel's opinion as to the validity of such assignment, it appeared that it was void according to Spanish law. The defendant further alleged that he claimed no interest in the goods in question, and that he did not collude with the plaintiffs or with Jordi, and that the right to the said goods and their value was claimed by Jordi, who would probably sue for the same.

Mr. Justice Mathew sitting at chambers declined to make the order asked for upon the ground that, Jordi being a foreign subject and resident abroad, this Court would have no authority to enforce any order which might be made against him. The matter does not appear to have been fully argued at chambers,

(1) 3 C. P. D. 373, 450. (2) 4 C. P. D. 221.

nor was the attention of the learned judge called to the authorities.

Had Jordi actually commenced an action in this Court against the defendant, claiming the goods or their value, it would seem clear that the Court ought to make the order asked for upon the ground that Jordi, when seeking to avail himself against the defendant of the jurisdiction of an English Court, must properly be held to be amenable to any order which the Court might think right to make with a view of doing substantial justice between all the parties before it.

It would seem however upon principle that although Jordi is not now before the Court, but only threatens an action against the defendant, it is equally reasonable that he should be served with a copy of the interpleader order. It is one of the first principles of all judicature that, wherever there is a dispute as to the right to property or its value, all the parties interested therein should be before the Court, in order that the matter may if possible be finally settled and complete justice done.

Now in the present case the Court by making the order asked for, does not assert any present jurisdiction over Jordi, or propose to compel him to submit to its process, but merely gives him notice of the proceedings which are being taken; so that if after such notice he should decline to submit to the jurisdiction of the Court, and allow the rights as between the plaintiffs and defendant to be determined in his absence, and hereafter commence an action against the defendant in respect of the identical claim now made by the plaintiffs, he may be barred from continuing proceedings which would be harassing upon the defendant, who would thereby be twice vexed for the same cause. If Jordi has a good claim, as he asserts, against the defendant, he is not put in a worse position by prosecuting it now instead of waiting till the action by the defendant is determined.

The question now before us does not appear to have arisen often in our Courts. Mr. Barnes, however, cited the case of *Stevenson* v. *Anderson* (1) as containing the high authority of Lord Eldon in favour of the view we have taken. The defendant, who had ordered goods from J. & J. Goodall, in Scotland, and remitted

(1) 2 V. & B. 407.

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bills to them in payment, and afterwards was sued in Scotland by a creditor named Dick, who had attached the bills in the hands of the Goodalls, the defendant wrote to the Goodalls desiring to have the bills returned, and also demanded them of the plaintiff to whom they had been sent to procure payment of them. On his refusing to deliver them up, the defendant commenced an action of trover against the plaintiff. The plaintiff then filed his bill, praying that the defendants, the Goodalls and Dick, who were out of the jurisdiction, might interplead as to the bills, and for an injunction. This bill was sustained on demurrer; and, in giving judgment, Lord Eldon fully explained the grounds upon which the jurisdiction of the Court rested, as follows: "It was objected that the Goodalls and the attaching creditor are out of the jurisdiction; and, as there is only one creditor within the jurisdiction, a bill of interpleader cannot be filed. Upon the authorities that proposition cannot be maintained, as a person out of the jurisdiction may threaten and bring an action, and, though he should never come within the jurisdiction, there is a familiar mode of concluding him. The plaintiff is bound to bring all persons into the field to contend together. That rests upon him. I have had occasion to consider that with reference to persons, not residing in Scotland, but foreigners; and the opinion I formed upon it without any difficulty or the aid of a precedent, which I could not find, though there is precedent enough of willing defendants, is that the plaintiff in a bill of interpleader against persons within and without the jurisdiction is bound to bring them all within the jurisdiction in a reasonable time; if he does not, the consequence is that the only person within the jurisdiction must have that which is represented to be the subject of competition; and the plaintiff must be indemnified against those who are out of the jurisdiction when they think proper to come within it and sue either at law or in this Court. If the plaintiff can shew that he has used all due diligence to bring persons out of the jurisdiction to contend with those who are within it, and they will not come, the Court upon that default and their so abstaining from giving him the opportunity of relieving himself, would, if they afterwards came here and brought an action, order service on their attorney to be good

service, and injoin that action for ever; not permitting those who refused the plaintiff that justice to commit that injustice against him."

In a more modern case, *East and West India Dock Co.* v. *Littledale* (1), some of the parties whom it was sought to make defendants in an interpleader were Parsee merchants resident at Bombay, and the same objection was raised. The report does not disclose what was said upon the argument or in the judgment upon this point. It is clear, however, that it was brought to the attention of the Court, and also that the Vice Chancellor (Sir James Wigram) allowed the order to go.

Mr. Barnes in moving properly called our attention to a dictum in *Patorni* v. *Campbell* (2), which, if effect is to be given to it, is clearly against his application. Alderson, B., says: "Besides, I do not see what right we have to bar a foreigner resident out of the jurisdiction of the Court." The judgment, however, proceeded on a different ground; and this matter does not appear to have been argued by counsel or alluded to by the other members of the Court.

Upon this state of the authorities, and for the reasons already given, we think that the present application should be granted. It is only for leave to serve the summons, and it will be open to Jordi to raise any point after he is served. As, however, the question is of some importance as affecting the practice in interpleader, we have thought it right to deal with it fully.

Application granted.

Solicitors for applicant: *W. A. Crump & Son.*

(1) 7 Hare, 57. (2) 12 M. & W. 277.

W. A.

1883
Nov. 27.

[IN THE COURT OF APPEAL.]

THE LION MUTUAL MARINE INSURANCE ASSOCIATION, LIMITED *v.* TUCKER.

Company—Company limited by Guarantee—Mutual Marine Insurance Association—Memorandum and Articles of Association—Liability of Members—Limitation of Liability in the Event of Winding-up the Association—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 9, 38.

The defendant was the owner of a ship insured and entered in a certain class of a mutual marine insurance association, which was limited by guarantee and incorporated under the Companies Act, 1862. The object of the association was the mutual insurance of ships of members or in which they were interested. According to its rules a person by entering his ship to be insured, as the defendant had done, became a member of the association, and whilst his ship was insured by the other members of his own class he was an assurer of the vessels of such other members entered in the same class as that in which his own had been so entered. By the memorandum of association the declaration of the undertaking required, by s. 9 of the Companies Act, 1862, on the part of a member of an association limited by guarantee was as follows: "Every member of the association undertakes to contribute to the assets of the association in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the association contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves such amount as may be required, not exceeding 5*l.*" Whilst the defendant's ship continued to be so insured and the defendant was such member the association resolved to be wound up voluntarily:—

Held, that the defendant was liable to pay his proportion of losses in respect of vessels entered and insured in the same class as his own, and that his liability was not limited to 5*l.*, since the debts and liabilities mentioned in the declaration of undertaking were those of the association as against its members, and in respect of which the 9th section of the statute required such declaration to be contained in the memorandum of association, and were not the debts and liabilities to which the members by the rules of the association were to contribute as insurers or as assured.

ACTION for calls or claims due from the defendant as a member of the plaintiff association. By a master's order, and by the consent of the parties, a case was stated for the opinion of the Court, the material facts of which were as follows:—

The plaintiffs prior to 1876 were a mutual marine insurance association not incorporated, and the objects for which the

association was established were (amongst others) the mutual insurance of the ships of the members, and of ships which the members might be authorized to insure in their own names, and of ships in which they might be interested. Claims when passed and settled in accordance with the provisions of the association were paid by the members in proportion to the amounts insured by them in the association. The association, in or about February, 1876, was incorporated under the Companies Acts, 1862 and 1867.

By the memorandum of association the association was stated to be a company limited by guarantee and not having a capital divided into shares, and the objects for which the association was established were stated to be, inter alia, the following :—

"The mutual insurance by the association (a) of the ships of the members and of ships which the members may be authorized to insure in their own names, and of ships in which they may be interested; and (b) of the freights and outfits of such ships; and (c) of the individual members themselves against any liabilities that may be incurred by them personally, as owners or otherwise in respect of such ships; and (d) of all other interests or matters usually or properly covered by or included in insurances with respect to shipping and to interests therein, or liabilities in respect thereof, every such insurance being undertaken by the association, either as such or on behalf of members of separate classes within the association, but without contribution or liability as between such separate classes, except as to working and other expenses; and (e) the doing of all such other things (including the effecting and accepting of insurances) as are incidental or conducive to the attainment of the above objects."

The memorandum of association also contained the following clause :—

"5. Every member of the association undertakes to contribute to the assets of the association in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the association contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding up the

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same, and for the adjustment of the rights of the contributories amongst themselves such amount as may be required, not exceeding 5*l*."

The following are the material clauses of the articles of association:—

4. "Every person who on behalf of himself or any other person or persons insures or enters for protection any ship or ships, or share or shares of a ship, or the freight or outfit thereof in the association, shall as from the date of the commencement of such insurance or protection, be deemed to have become a member of the association, and every such person shall be deemed to have ceased to be a member so soon as he shall no longer have any ship or share, or shares of a ship, or the freight or outfit thereof, under insurance or protection in the association, but without prejudice to the rights and remedies of the association against the person so ceasing to be a member in respect of obligations incurred up to the time of his so ceasing to be a member."

34. "The managers of the association shall comprise the members for the time being of the firm of A. & J. Gray, at present consisting of Andrew Gray and Joseph Gray; the said Andrew Gray and Joseph Gray, or the survivor of them, or the members for the time being of the said firm of A. & J. Gray, being hereby empowered to alter the name and style of and to admit other members into their said firm."

36. "The business of the association and each of the classes or divisions thereof shall be conducted by the managers according to the rules for the time being of the association and of such respective classes or divisions thereof" (1).

(1) It is only necessary to refer to those rules of the association which relate to "Class 1—Lion, Iron, A 1," and of these the following are material:—

2. "The members of this class shall severally and respectively insure each others ships or shares of ships from noon of the twentieth day of February, 1876, or from the date of entry of each ship respectively until noon of the twentieth day of February, then next, and from that until noon of the twentieth day of February in the next succeeding year; and so on from year to year, unless notice to the contrary be given as hereinafter mentioned, against all losses, perils, and damages of whatever nature and kind soever, which may be sustained or received by their respective ships, or caused or done by them to other

39. "All policies of insurance issued or underwritten on behalf of any of the said classes shall be issued or underwritten by the managers for the time being of the association in the name of

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ships or craft, except when on the voyages, in the trades, with the cargoes, or under the circumstances hereinafter particularly excepted. Every ship entering this class is warranted safe at the time fixed for the inception of the risk. No act of the insurers or insured in recovering, saving, or preserving the property insured shall be considered as a waiver of or acceptance of abandonment. Each day shall be considered to begin and end at noon."

14. "All claims made upon this class shall be prepared by a professional average stater, according to the usage at Lloyd's (except as otherwise directed by these rules, and the customs of this class), and delivered at the office of the managers seven days at least before the next drawing, to entitle the claimant to have any claim considered for settlement in that drawing. Claims settled by the committee shall be drawn for at two months' date from the first of March, June, September, and December. All claims shall be forfeited if not made within one year after the expiration of this policy, unless the committee be satisfied that the delay was beyond the control of the insurer."

24. "The managers' drafts on any member of this class for his proportion of all claims written off by the committee shall be duly accepted and punctually paid in London when due; and if any member shall neglect or refuse to accept any such draft, or to pay his contributions on receiving notice from the managers, his respective ship or ships shall cease to be insured in this class, and he shall absolutely forfeit all claim for or in respect of any loss or average under his policy or policies effected therein, but he shall still remain liable to contribute to all losses and averages which may occur during the period for which any such policy was originally granted."

28. "The sum to be paid by this class to any member for any loss or damage shall, in the first instance, be ascertained and settled by the committee; and the member, if he agree to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before; and payment shall only be claimed according to the customary mode of payment in use by this class. And if any difference shall arise between the committee and any member, relative to the settling of any loss or damage, or to any claim for average, or any other matter relating to the insurance, in every such case the member dissatisfied shall name one arbitrator on his behalf, and the committee shall select another, and if either party neglect or refuse to make such selection within fourteen days after being required to do so, the other shall select two; and in either case the two selected shall forthwith select a third, which three arbitrators, or any two of them, shall decide upon the claims and matters in dispute according to the rules and customs of this class, to be proved on oath by the managers, provided that in any such case a sole arbitrator may, with the

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the association, and shall have a copy of the rules of such class or division indorsed thereon or annexed thereto, which shall form part thereof and shall have the same effect as if incorporated and included in these articles; but no person shall in respect of any insurance or protection in any of the classes or divisions be liable to pay or entitled to receive any money in respect of any insurance or protection in any other of the classes or divisions."

40. "Every engagement or liability of a member of the association in respect of any insurance or protection shall for all purposes relating to enforcing such engagment or liability, be deemed to be an engagement or liability by or on the part of such member to the association, and not to any other member or members, and all moneys payable thereunder shall be paid to the managers for the time being of the association."

"41. All claims in respect of insurances or protection shall be made and enforced against the association only, and not against any members thereof; but the association shall not be liable to any member or other person for the amount of any loss, claim, or demand, except to the extent of the funds which the association

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consent of both parties, be appointed; and on such arbitration which shall be held in London, the party demanding it shall state the sum which he claims. The costs shall be in the discretion of the arbitrators: Provided always, and it is hereby expressly declared to be a part of the contract of insurance between the members of this class that no member who refuses to accept the amount of any loss as settled by the committee in manner hereinbefore specified, in full satisfaction of such loss, shall be entitled to maintain any action or to institute any proceedings whatever in any Court of Judicature by virtue or in respect of his policy, until the matters in dispute shall have been referred to and decided by arbitrators appointed as hereinbefore specified, and then only for such sum as the said arbitrators shall award; and the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or other proceeding. All moneys from time to time payable by any member of this class may be recovered by action commenced under the instruction of the managers for the time being in the name of the Lion Mutual Insurance Association, Limited; but the association shall in no case be liable to any member of this class for any claims other than for moneys actually received from contributing members in respect of claims then payable to such member."

is able to recover from the members or persons liable for the same, and which are applicable to that purpose."

"42. All payments in respect of any insurance or protection in any of the classes or divisions of the association or otherwise shall be made to or by the managers for the time being of the association, who for this purpose shall represent the association. In case the association shall incur any costs or expenses in or for any legal proceedings or arbitration or otherwise in respect of the business of any class, such costs and expenses shall be made good to the association by the members or funds of that class."

"44. Payments or contributions shall from time to time be paid to the managers by the members of each class or division of the association according to the rules and regulations thereof for the purpose of providing funds for making any payments necessary or proper to be made by or on behalf of the association for expenses connected with the business thereof or otherwise."

"45. In the event of any sums for the time being payable by any member of the association not being duly paid the amount of such deficiency shall be borne and made good rateably by the other members of the association, or of the respective classes or divisions in which such deficiency has occurred, as the case may be; and payment may be enforced in the name of the association. Each member of the association who may for the time being be entitled to receive from the association, or the respective classes or divisions, any loss, claim, or demand shall bear and contribute his own proportion thereof as a member."

The defendant was the owner of a ship named the *Langland*, which was insured and entered in the classes of the association described in the rules as "Class 1, Lion, Iron, A 1," and "Class 2, Empress, A 1," respectively. The vessel was entered in the classes respectively on or about the 20th of March, 1876, and the defendant from the date of the entry became, and was, and continued to be, until and at the date of the resolutions hereinafter mentioned a member of the association and liable for the payments in respect of losses incurred by other members as provided for by the rules. The vessel ceased to be insured in "Class 2, Empress, A 1," on the 20th of February, 1878, but

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continued to be insured in "Class 1, Lion, Iron, A 1," until the date of the resolutions.

On the 3rd of December, 1878, at an extraordinary general meeting of the members of the association a resolution was passed, which was confirmed at a further meeting of the association on the 19th of December, 1878, that the association should be wound up voluntarily under the provisions of the Companies Acts, 1862, 1867, and 1877.

Pursuant to the said resolution and the articles of association and rules of the association claims in respect of vessels entered and insured at the date of the resolutions in the two classes respectively of the association were duly made, and were settled by a committee for the purpose of passing claims, and drafts for the defendant's proportion of such claims were drawn upon the defendant in accordance with the articles of association and rules of the association.

Notices of two calls or claims upon the defendant as a member of the association in respect of the said vessel were sent to him on the 15th of January, 1879, with drafts inclosed for the defendant's acceptance at two months' date from the 1st of December, 1878, and notices of two further calls or claims were sent to him on the 21st March, 1879. All the losses claimed for in such notices occurred prior to the 3rd of December, 1878, and prior therefore to the date of the said resolutions.

The amounts claimed were admitted to be recoverable, subject to the defendant's contention that his liability in respect of the said claims and all other the debts and liabilities of the association and the costs of winding up the same was limited to the sum of 5*l.*, by virtue of the 5th clause of the memorandum of association.

The question for the opinion of the Court was whether the defendant was liable beyond the sum of 5*l.*

The Queen's Bench Division were of opinion that the defendant was not liable beyond 5*l.*, and that sum having been paid into Court, the Divisional Court ordered that judgment should be entered for the defendant.

The plaintiffs appealed.

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Sir F. Herschell, S.G., and *Cohen, Q.C.*, for the plaintiffs. The defendant is not discharged by the winding-up from losses occurring before it took place. The defendant's liability to pay arose as soon as a ship was entered. The articles of association and rules throw light upon the position of the defendant. He undertook to pay his proportion of the losses sustained in the class of which he was a member. It is not disputed for the defendant that he was under a liability to pay for losses up to the time of winding-up. His liability was a debt due to the company, which was quite distinct from his liability as a member. If the construction were such as is contended for on behalf of the defendant, a majority of the members whose ships were safe might wind up the company and so escape liability to the minority whose ships were lost. The sum claimed is not due from the defendant as a contributory; it is a liability collateral to membership. It is not a liability to the creditors of the association. It is a debt recoverable by the association from the defendant according to the articles and rules of the association, but the payment of it by the defendant is not a contribution to the assets of the association so as to come within clause 5 of the memorandum of association, for the debt itself is an asset. The construction of the defendant is irrational; suppose that a loss is adjusted, and that a member as to that loss is in default and owes 1000*l.* to the company, can it be contended that upon a winding-up the liability to pay 1000*l.* is reduced to a liability to pay 5*l.*? The liability to pay the 5*l.* is merely a liability arising from the defendant's membership; the liability to contribute to the losses of the other members depends upon the benefit which he has received by having his ship insured. The present case is like that of a co-operative store, where a member is liable only to the value of his shares, but is liable to pay for goods supplied to him. *Maxwell's Case* (1) and *M'Kewan's Case* (2), which were both in connection with the *Maria Anna and Steinbank Coal and Coke Company*, are expressly in point, and shew that notwithstanding a limitation similar to that in clause 5 of the memorandum of association the members may inter se be liable beyond such limit.

(1) Law Rep. 20 Eq. 585. (2) 6 Ch. D. 447.

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Sir H. Giffard, Q.C., and *B. Jones*, for the defendant. The question really is as to the construction of clause 5 of the memorandum of association. Is the construction unreasonable which the defendant contends is the proper one, viz., that in the event of the association being wound up his liability, as well as that of any other member, is limited to 5*l.*? As long as the association is a going concern the defendant is content to assure as well as to be assured, but when it has ceased to be a going concern then the defendant contends he is not to be liable beyond the sum for which he has agreed by the memorandum of association to be liable, namely, 5*l.*, otherwise where is to be the limit? In *McKewan's Case* (1) there was an express agreement provided for by the articles of association that the shareholders should contribute to the payment of certain specified debts, and what Jessel, M.R., there held was that such an agreement might lawfully be made, and that it was not contrary to the Companies Act, 1862; but here the question is only as to the meaning of the contract contained in the 5th clause of the memorandum of association. This 5th clause is required to be in such memorandum by s. 9 of the Companies Act, 1862, and by s. 38, sub-s. 5, a member's liability, in the event of the company limited by guarantee being wound up, is not to be beyond the amouut for which he has by the memorandum of association contracted to be liable. (2) There is the contract of membership on a man

(1) 6 Ch. D. 447.

(2) The following are the material parts of ss. 9 and 38 of the Companies Act, 1862:—

Sect. 9. "Where a company is formed on the principle of having the liability of its members limited to such amount as the members re-respectively undertake to contribute to the assets of the company in the event of the same being wound up, hereinafter referred to as a company limited by guarantee, the memorandum of association shall contain the following things, (that is to say,) . . .

"(4.) A declaration that each member undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount."

Sect. 38. "In the event of a company formed under this Act being wound up, every present and past member of such company shall be

becoming a member of the association, and there is that contract only, which applies in this case. In the event which has happened the defendant has by the 5th clause of the memorandum of association bargained to be relieved from liability to contribute more than 5*l.* to the payment of the debts and liabilities of the association, and what he is now being sued for is his contribution to such debts and liabilities.

Cur. adv. vult.

Nov. 27. BRETT, M.R. This is an appeal from a judgment of the Queen's Bench Division upon a special case, in which the decision of the Court was in favour of the defendant. The claim in respect of which the special case was stated was this: The plaintiffs were a mutual marine insurance association, limited, and the defendant was a member of that association. The association was being wound up, and the action was brought for the defendant's contribution in respect of certain losses, which had happened before the winding-up. Those contributions exceeded the sum of 5*l.*, but the defendant paid into court the sum of 5*l.*, and the Queen's Bench Division held that the defendant was not liable to a greater contribution than such 5*l.* Now the case on the part of the plaintiffs is, that in respect of the losses for which contribution was sought the defendant was an insurer, and that the moment those losses occurred he became indebted to the association *in form*, but to the persons who had suffered the losses *in reality*, for his contribution to those losses. It was asserted on behalf of the plaintiffs that that debt was an asset of the association, which was not affected by the sections of the Companies Act of 1862 which were relied upon by the defendant. On the part of the defendant it was argued that this association was a company within the 9th section

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liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves with the qualifications following, (that is to say) . . ."

"(5.) In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association."

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of the Companies Act, 1862, and that under those circumstances it was necessary that there should be a declaration in the articles of association limiting the liability of the members, and that there was in the articles in the present case such a declaration, and that it did limit the liability of every member in the case of a winding-up to 5*l.*; and, consequently, there being a winding-up, the liability of the defendant was limited to the sum of 5*l.*, and by s. 38 of the Companies Act, 1862, he could not be made liable beyond that amount. The Divisional Court was of that opinion, and we are to say now what is our view upon that matter. The case must depend upon what is the true construction of the statute, because the declaration in these articles of association is intended to follow, and is in the very words of the statute. The question therefore comes to this, whether this contribution for which the defendant is sued is such a contribution as is mentioned in sub-s. 5 of s. 38. Now that in terms this is a contribution by the defendant as a member of the association, and is a liability of the defendant as a member of the association, cannot be doubted, but it is not because the words of a statute or the words of any document read in one sense will cover the case that that is the right sense. Grammatically they may cover it; but whenever you have to construe a statute or document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used, unless there is something which obliges you to read them in a sense which is not their ordinary sense in the English language as so applied. That, I take it, is the cardinal rule.

Now what is the subject-matter with which the statute is dealing, and with which this declaration in these articles of association is dealing? In the statute there are other associations to which the statute is applicable. In these articles of association the subject-matter is a mutual marine insurance association. The statute applies to such an association, but also to other associations, and the articles of association apply to such an association. The question then is, what is the true construction of the statute and of the articles of association as applied to the subject-matter with regard to which they are used, namely, an association

of mutual marine insurance. Now a mutual marine insurance association is a well known mercantile association. The rules of the association, which are indorsed on the policies or are otherwise in the documents of the society, constitute the relation as amongst its members of a mutual marine insurance association. Men become members of that association by placing a ship of theirs in the association for the purpose of that ship being insured by certain of the other members.

By the rules when that ship is placed in the association, the amount for which the owner desires that she should be insured is named and the class is named. By putting his ship into the association the owner becomes a member of the association, but does he become simply a member or does he become a member and something more? He becomes an assured, for his ship is insured by the other members who have put their ships into the society, and have become members in the same class as his own; but by the same act by which he becomes an assured he also becomes an insurer of other ships. Treating him as an assured, what is the meaning of being assured in insurance law? It is that in respect of a consideration moving from him to others due or payable to them, or in respect of which he is liable to them, whether there is a loss or not, he is insured to the extent to which he has insured himself in case of a loss. Now that consideration moving from him in respect of which he is insured is in insurance law called a premium, usually that premium is a sum of money, but it is not necessary that it should be such, and it may be some other liability than the payment of money. Therefore, by being an assured, the person assuring is liable to that which in its largest sense is called a premium, and in respect of that premium in case of a loss he is entitled to an indemnity. Now when a loss in such a society as this occurs, which is not the loss of the person whose ship is insured treating him as an assured, the premium that he is to pay is a liability to contribute to the loss of the other members of his class when they lose. That is his liability in respect of which he is insured. Therefore treating him as an assured, when there is a loss of other ships in his class, he is bound to pay them their loss, but that is paying the premium on his own policy if

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you treat him as an assured. If you treat him as an insurer, the premium which is payable to him as an insurer is the indemnity for the loss to him, if a loss occurs to his vessel. The premium paid to him is the right to have the loss of his vessel, if it occurs, indemnified to him by others, and in respect of that premium, when a loss occurs to other people, treating him as an insurer, he is bound to pay such loss. He is either to pay that loss as the premium on his policy treating him as an assured, or is to pay the loss on the other policies treating him as an insurer. In neither case does he really owe that to the association, if you take the association to mean all the other members of it but himself. He is really liable to the members whose vessels have been lost to contribute to that loss, but on account of the difficulties of procedure in such a case it was agreed between him and the other members when he became a member, and the law allows it, that in that case he should not be sued by the individual owners but by the association. He is sued by the association, on behalf of those members of his class who have suffered the loss, for that which is a debt, the moment the loss is adjusted, due from him to such other members, though in form he is sued for it as a debt due from him to the association. Now what is a man who has undertaken those relations? There is no doubt he is a member of the association, but he is something more, he is a person insured by some of the members of that association, and he is an insurer of some of the members of that association. Therefore he is not only a member, but also an insurer and an assured, he is all three. It must be obvious that in such societies as these there should be expenses and liabilities of the association taking the association as a whole, such as the officers and offices of the association, and many other things which are expenses different from the liabilities or debts which are the result of the insurance, because it must be observed that there is no liability with regard to any insurances until there is a loss. There is no premium paid nor liability to pay for a loss until there is a loss, but there must be expenses even although there never was a loss; there would be the expenses of the secretary if the association had one, or of the manager if it had one, or of an office if it had one, and therefore there would be expenses in

respect to which the association must look to its members as members. There are also liabilities of the members, not to the association as a whole in fact, but amongst each other in reality, and in form to the association. Now I take that to be the subject matter with which this Act of Parliament and these articles of association are dealing. Then s. 9 says:—[His Lordship here read s. 9.] Then s. 38 says: "In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association." What is the meaning of the word "contribution" there? It seems to me that it is contribution as a member. Then if that be so, now let us apply to it the declaration in the memorandum of association. [His Lordship here read the 5th clause of the memorandum of association.] He is, therefore, to contribute to the assets of the association. What for? "For payment of the debts and liabilities of the association." In one sense the amount of these losses for which this action is brought, may be said to be a debt and liability of the association; but is it so within the meaning of the Act of Parliament and of this 5th clause? It seems to me it is not. I think that the debts and liabilities mentioned in this 5th clause are the debts and liabilities in respect of which a declaration was necessary in the memorandum or articles of association under the Act, and those are the debts and liabilities of the company or association as against its members as members only, and to which they must contribute as members and not as insurers or as assured. If that be so, the limit of £5 is a limit of the liabilities of the member in respect of the liabilities of the association to which he can be required to contribute as member, but not in respect of the debts and liabilities of the association for which it can nominally be sued, but which are not really debts and liabilities of the association at all, but of certain members to other members of the association. This defendant was liable to pay in reality to other members of the association, either as an insurer his part of the loss which they had incurred or, if he be treated as an assured, the premium in respect of which he himself would have been

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insured in case of a loss. Because he delays to pay until after there is a winding-up of the association, it is said that, although all the other contributories who paid in time were bound to pay the whole, and did pay, yet the defendant shall take advantage of his own delay in paying, and be allowed to say on account of that delay, "I am bound only to pay £5." That may be the grammatical meaning of the 5th clause of the memorandum of association, but if it is the meaning it leads to absurdity and gross injustice, whereas if it be read in another way, to which the words are equally applicable, it does that which is just, and leaves him liable to pay, as he would have had to pay if there had been no liquidation, for the benefit of the persons assured. It leaves him also bound to contribute, but to a limited amount, namely, that of £5, to the expenses of the association, which would have been expenses whether there had been a loss or not.

Reading the statute and also the articles or memorandum of association as applying to the subject-matter to which in this case they are applied, namely, a mutual insurance association, one reading is sensible and just, and according to the ordinary modes of business, whilst the other is senseless, unjust, and absurd. Which, then, is the right way to read the words? It seems to me that the right way for the Court to construe words which are applicable to two cases, and which will produce two results, one of which is ridiculous and the other just and according to business, is to read them so as to carry out that which is just and honest and businesslike. Therefore I cannot agree with the decision of the Divisional Court, and I think it ought to be reversed.

BOWEN, L.J. I am of the same opinion. I think that the defendant is not sued to contribute to the assets of the association either for payment of the debts and liabilities of the association, or for the payment of sums to be required to adjust the rights of contributories among themselves, within the meaning of the Companies Act of 1862. If he was, then there might be a difficulty in the action being maintained by reason of sub-s. 5 of s. 38 of the Act. Now what is it for which the defendant is sued? It appears to me that it is really a contribution to a sum

which he has agreed as between himself and the association and certain others, his fellow associates, to pay to the association, as and for insurance which is due to certain other members of his own class. I do not think that such a contribution falls within the language of sub-sect. 5 of s. 38. The Act of Parliament defines the liability of members of a company like this, which is one limited by guarantee; s. 7 provides that the liability of companies so formed may be limited to the amount which the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of it being wound up. That general provision is carried out with greater detail by s. 9:—[The Lord Justice here read s. 9.] The liability which is pointed out in that section appears to me to be the liability of a member as such. Everybody is a member primâ facie whose name is on the register and who has agreed to become a member of the society, but no exact definition of the word "member" is to be found in the Act. One may take it broadly, that persons who are members of societies like this are persons who agree to take shares in the adventure and to become contributories to the necessary liabilities and expenses of the company. Now it seems to me, in the first place, that the liability which is sought to be enforced in this action is not that which a man undertakes to incur by becoming a member of an incorporated association, but it is something more; it is a liability which he incurs under the very articles of association and memorandum of association to which he subscribes, and in virtue of which he becomes an assured and an insurer between himself and other members of the same class of the society which he chooses to join. The memorandum of association I think clearly shews that it was intended that the business of the society should be carried on in a manner which would be perfectly impossible if the narrower construction which the defendant contends for were placed on the language of the Act and of the memorandum itself. Is it intended that the person who becomes a member and an insurer in the association is not to be liable for more than 5*l.*? It is impossible to read clause 4 of the memorandum of association without seeing that it is intended that far greater liability

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to contribute should be undertaken by those who insure than that, although clause 5 of the memorandum, following the words of the Act of Parliament, contains the following:—[The Lord Justice here read such 5th clause.] The whole scope of the language of the memorandum to my mind indicates that those who signed it intended, on the one hand, that as regards the debts and liabilities of the association as such, and the liabilities of the members pure and simple as such, and their liability to contribute to the adjustment of the rights of contributories as such, the limit should be 5*l*. But, on the other hand, they intended that there should be other liabilities at the same time as between themselves and the other members of the class which they joined, which would exceed that amount if occasion should require. It is not possible, I think, to conceive a society like this intentionally being framed on such a basis and with such machinery as that every insurer should be at liberty to desert the ship in which he has embarked the first moment he found her sinking, leaving behind him a paltry contribution of 5*l*., irrespective of the other engagements which he had entered into under the articles of association with the other members of his class to which he belonged, and irrespective of all the other benefits which he had derived from associating himself with them. Now the articles of association which shew how the business of the association was to be carried on are arts. 34, 39, 40, 41, and 45, and the real effect of these is that the insurer and assured of the several classes were to be interdependent upon one another, there being liabilities which each member undertook which really in substance were, although perhaps not in legal form, liabilities towards the other members of his class, who in reality were to find funds for the discharge and settlement of the losses which might occur within the class. That is on the one hand clear. On the other hand it is equally clear that it was the intention of the rules that the corporate name of the association should be used as a machinery only between those who were seeking to enforce these liabilities and their fellow contributories, and it seems to me that the legal liability which the corporation is enforcing under these articles and rules, and by the working of this machinery against the members of any particular class, is not a

liability to contribute to the assets of the association for payment of the debts and liabilities of the association, within the meaning of s. 38; nor for the payments which may be required for the adjustment of the rights of contributories; for to be such payments within the meaning of that section they must be, I think, for the adjustment of the rights of the contributories as such. For the same reason I think that this liability which the corporation is enforcing is not a liability which a man incurs as a member only. It is something more. It is a real business obligation to which he binds himself by virtue of the articles of association which he signs at the same moment that he becomes a member. It is a fallacy to suppose that he does nothing except simply become a member of the association within the meaning given to the word "member" by the Companies Act, 1862, because he really becomes an assured and an insurer, and a person who has a right to demand the benefits, and is bound to bear the burdens, respectively which are to be distributed among the classes of the society.

BRETT, M.R. The Lord Chief Justice, who heard this case, agrees with our decision.

Judgment reversed.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for Defendant: *Williamson, Hill & Co.*

W. P.

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Dec. 10.

LEIGH AND ANOTHER *v.* DICKESON.

Tenants in Common of a House—Ordinary Repairs—Contribution.

One tenant in common of a house who expends money on ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution.

FURTHER CONSIDERATION.

This was an action tried before Pollock, B., in which the plaintiffs and the defendant were tenants in common of a house, on which the defendant had expended money in ordinary repairs. The defendant claimed, by way of set-off, contribution in respect of the money so expended.

Grantham, Q.C., and *Gore*, for the plaintiffs.
Finlay, Q.C., and *C. A. Russell*, for the defendant.

Cur. adv. vult.

Dec. 10. POLLOCK, B. This action is brought by the plaintiffs, as trustees of Mrs. Eyles, to recover from the defendant the sum of 24*l.* 9*s.* 6*d.*, which they allege to be due to them from the defendant for the use and occupation by the defendant of three-fourths of premises in Market Lane, Dover, for 264 days at the rate of 45*l.* per annum, and also three quarters' rent of a piece of land and buildings at the rear of the above. With regard to the second claim, the amount of it was tendered before action, and has been paid into Court, and therefore no question now arises with respect to it. As to the claim in respect of the three-fourths of the above premises, the case was heard before me without a jury at the Lewes assizes, and afterwards upon further consideration, when the following facts were agreed upon by counsel.

In 1860, Mrs. Eyles (then Mrs. Worger) was entitled to an undivided three-fourths of the house in Queen Street, Dover, as tenant in common with another; and on the 4th of January in that year, Mrs. Worger, by lease, let to one Prebble for twenty-one years her interest at the rent of 33*l.* 15*s.* per annum. This

lease contained a covenant on the part of the tenant to execute internal repairs, and on the part of Mrs. Worger to execute external repairs. In 1865 the lease was assigned by Prebble to the defendant, who entered and paid rent. In 1871 the defendant purchased the one-fourth interest of the other tenant in common. On the 6th of January, 1881, the lease expired, and the defendant continued in possession. A correspondence then took place between the plaintiffs and defendant and their solicitors with a view to continue the tenancy, but the plaintiffs asking for an advanced rent, which the defendant was unwilling to pay, no further agreement was effected. On the 15th of February, 1882, the present action was commenced, the plaintiff claiming for use and occupation since the expiration of the lease. It was also admitted that upon the 24th of January, 1881, proceedings had been taken by the plaintiffs against the defendant in the county court of Kent. These do not, however, appear to me to be relevant to the claim in the present action, and therefore I make no further reference to them.

On behalf of the defendant it was contended that the action would not lie, because one tenant in common cannot sue another tenant in common for the rent of premises owned by them. It is, however, unnecessary to deal with this general proposition, because in the present case a claim is made by the plaintiffs against the defendant not simply to recover the value of premises occupied by him as tenant in common, but it is brought for the use and occupation of the three-fourths of the premises which were let by the plaintiffs' cestui que trust to Prebble in 1860, by a lease which was afterwards assigned by Prebble to the defendant, who entered and paid rent. Having carefully considered the correspondence that passed between Mrs. Eyles and her solicitors and the defendant and his solicitors, I have come to the conclusion that the occupation by the defendant, which occurred after the expiration of the lease in question on the 6th of January, 1881, must be referred, not to his right as tenant in common, but to his continuing in occupation as tenant at sufferance. Now it is quite clear from the authority of Lord Coke in Co. Litt. 186a, which was adopted by the Court in *Cowper* v. *Fletcher* (1), that

(1) 6 B. & S. 464.

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one joint tenant may let his part for years or at will to his companion, and I think it is equally clear that if after the expiration of such a lease the tenant holds over, the same consequences must be taken to follow as would arise in the case of a lease between strangers, and that the lessor would have a right to treat the defendant as a tenant at sufferance for the period during which he held after the expiration of the lease, and to sue him for use and occupation in respect thereof. If any authority were required for this, the case of *Bayley* v. *Bradley* (1) seems to suffice. Looking, therefore, at the case in this light, my judgment will be for the amount claimed, 24*l.* 9*s.* 6*d.* being the amount recoverable for 264 days' occupation at the same rate as was reserved by the lease.

This disposes of the plaintiffs' claim. The defendant, however, by way of counter-claim, charges the plaintiffs with a sum of 80*l.*, which, he alleges, he laid out and expended in substantial and other proper repairs and improvements upon the premises since the expiration of the lease. With regard to this claim, it is first to be observed that it is made not in respect of any breach by Mrs. Eyles or her trustees of the covenant contained in the lease, but for what are called substantial and proper repairs and improvements. To this set-off and counter-claim the plaintiffs demur, and it was admitted by counsel that if the demurrer should be overruled, the defendant was entitled to judgment upon the counter-claim, so that any question of amount, and any distinction which might be taken between repairs and improvements, is apparently waived, and the question is broadly raised whether, having reference to the legal relation which existed between the parties, the plaintiffs are liable to recoup the defendant for money so laid out by him in repairing the premises in the absence of any express contract. There is, however, nothing to shew that but for them the subject-matter of the tenancy in common would have perished, so as to bring the case within the principle of those decisions in which it has been held that, where an outlay is in the nature of salvage, all interested in the thing saved are bound to contribute.

No case or authority was cited by counsel to shew that going

(1) 5 C. B. 396.

back for a long period of years effect has ever been given by the Courts to a claim by action by one tenant in common against another for money which had been expended upon the repair of their common property, nor have I been able to find any such case or authority, although the claim deals with a matter of common occurrence, and the question must often have arisen if the defendant's contention be correct. It becomes necessary, therefore, to refer to the older law, and to see upon what principle any claim of a like nature has been rested, and how far, if at all, it would govern a case like the present. The writ by one of two tenants in common against the other de reparatione faciendâ is mentioned by the earlier law writers. Coke, in his Commentary upon Littleton, Co. Litt. 200 b, speaks of it thus: "If two tenants in common, or joint tenants, be of an house or mill, and it fall in decay, and the one is willing to repaire the same and the other will not, he that is willing shall have a writ de reparatione faciendâ, and the writ saith, ad reparationem et sustentationem ejusdem domûs teneantur; whereby it appeareth that owners are in that case bound pro bono publico to maintain houses and mills which are for habitation and use of men."

The right to this writ is also mentioned in almost similar terms in *Lewis Bowles' Case* (1), where it is said: "If there be two joint tenants of a wood, or arable land, the one has no remedy against the other to make inclosure or reparations for safeguard of the wood, or corn, but if there be two joint tenants of an house the one shall have a writ de reparatione faciendâ against the other, and the words of the writ are ad reparationem et sustentationem ejusdem domûs tenetur." Similar statements of the law will be found in 2 Co. Inst. 402, and Moor's Rep. 374. The writ is also mentioned in 2 Cruise's Dig. 377, as a common law writ.

The later authorities in substance adopt these two, and refer to them in much the same language. It is curious to observe that the remedy between the joint tenants is spoken of as if it was one which existed rather for the benefit of the community than of the joint tenant, but what is more to the purpose is to notice that in these passages and in the books in which the form of the

(1) 11 Rep. 82 b.

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writ itself is given, as in Fitzherbert's N. B. p. 127, and the Registrum Brevium, p. 153 b, the writ is to be found amongst those which require acts to be done by way of reparation, such as the repairing of mills either by the county or by an individual who is liable, the repairing of a bridge, wall, road, sewer, or pavement, the repairing by a neighbour of his house which is so in decay as to be dangerous; and in all these cases the ground of the claim seems to be such as to presuppose that the condition of the things to be repaired would be dangerous or useless unless the repairs in question were effected. This procedure differs widely from the right alleged in the present case of one tenant in common to expend money in the ordinary repairs of a house, and then recover from his co-tenant his share. In *Dering* v. *Earl of Winchelsea* (1), Eyre, C.B.. speaking of the right to contribution among sureties, mentions the case of tenants in common, and refers to the writ in Fitzherbert. He speaks of contribution generally as being founded upon an equitable right based upon general principles, and in the recent case of *Leslie* v. *French* (2) this dictum was cited by counsel, but I do not find that it received any assent in the judgment of Fry, L.J., and in neither of these cases—one being a claim between co-sureties, and the other a claim between co-owners of a policy of insurance—was it necessary to consider what was the law as applicable to tenants in common.

In Story's Eq. Jurisp. s. 1235, the subject is treated of, and the writer refers to some cases which have arisen in the Courts of America, but the only one which bears upon the question now before the Court is that of *Converse* v. *Ferre* (3), in which Parker, C.J., says that, "At common law no action lies by one tenant in common who has expended more than his share in repairing the common property against the deficient tenants," and he goes on to say that for this reason the legislature of the state provided a remedy which was applicable however to mills only.

An interesting judgment by Chancellor Kent, upon the subject of contribution will be found in the case of *Campbell* v. *Mesier*. (4)

(1) 1 Cox, 318.
(2) 23 Ch. D. 552.
(3) 11 Mass. 326.
(4) 4 John. 334.

A bill was filed by one of two owners of adjoining houses separated by a party-wall. It was an old party-wall between the two houses, and the owner of one of them being desirous to build a new house on his lot, pulled down the old house, and with it, the party-wall, which was ruinous, and rebuilt it with his new house. The owner of the adjoining house and lot was held to be bound to contribute rateably to the expense of the new wall of partition. The particular case was decided expressly upon the ground that it was absolutely necessary to have the wall rebuilt, and therefore it furnishes no authority for the right to contribution where ordinary repairs are done. In the course of the judgment Chancellor Kent refers to dicta expressed by different writers upon the civil law. One of these, Papinian (Dig. 17, 2, 52, 10), states it as a rule of the civil law, that if one part owner of a house in decay, repairs it at his own expense, upon the refusal of the others to unite in the expense, he can compel them to contribute their proportion, with interest, or, upon their default, at the end of four months, the house, at his election, becomes his sole property. This would seem only to apply to the case of such decay as would if not arrested by repair produce ruin. Pothier, speaking of party-walls, Contrat de Société, Première Appendice, No. 199, 203, accords the right to contribution for the rebuilding of a party-wall only where it is ruinous and needs to be rebuilt, independently of the raising of it by the part owner on one side.

I was referred during the course of the argument to a form of order which is to be found in Seton on Decrees, vol. ii., 1024, wherein an inquiry is directed as to what, if any, substantial repairs have been done by one or more of several tenants in common. This occurs in an order made in a suit for partition and sale, in which it is obvious the direction would be necessary, quite apart from such a right as is insisted upon by the defendant in the present action.

At common law no action of account lay by one joint tenant or tenant in common against his co-tenant. By the statute of 4 Anne, c. 16, s. 27, a tenant in common could be charged by his co-tenant in an action at law as bailiff for money received, a share of which the plaintiff was entitled to. The same end could

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also be better attained by a bill in equity. The history of the action of account will be found in Viner's Abridgment "Account," and under the same title in Selwyn's Nisi Prius. Except, however, in the case of a bill for partition I can find no trace of any action or claim in equity for contribution in respect of money expended for repairs.

This being the state of the authorities, the conclusion I arrive at is that the defendant has failed to establish his counter-claim against the plaintiffs. It may be said that this leaves the defendant to bear the costs of repairs which in equity and fair dealing ought to be borne in part by the plaintiffs. There is something no doubt in this argument, but it must be remembered that the relation which exists between tenants in common is peculiar. In cases where the money expended is for ordinary repairs, and not such as are absolutely necessary for the prevention of ruin, the inconvenience of taking an account between the co-tenants whenever one has paid more than his share would be great, and in almost every case in which they are unable themselves to agree as to what repairs are needed and how the costs of them should be divided, the only efficient remedy would be attained by a partition.

There will be a verdict and judgment for the plaintiffs upon the claim for 24*l.* 9*s.* 6*d.*, and also upon the counter-claim with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Palmer & Bull, for Lamb & Evett, Brighton.*

Solicitors for defendant: *Bower, Cotton, & Bower.*

A. M.

MORGAN *v.* THE LONDON GENERAL OMNIBUS COMPANY. 1883 Dec. 18.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 8 —*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—"*Journeyman*," "*Labourer*," "*Person engaged in Manual Labour*"—*Omnibus Conductor.*

An omnibus conductor engaged at daily wages, paid daily, is not a "person to whom the Employers and Workmen Act, 1875, applies," and therefore is not entitled to the benefit of the Employers' Liability Act, 1880.

ACTION under the Employers' Liability Act, 1880, 43 & 44 Vict. c. 42.

The plaintiff was employed by the defendants as conductor of one of their omnibuses at wages of 4*s.* per day, paid daily. In consequence of a defect in the ironwork by which the "monkey-board" (the conductor's standing place at the back of the vehicle) was supported, the plaintiff fell, and was injured.

At the trial before the judge of the Shoreditch county court, it was objected on the part of the defendants that the action was not maintainable, inasmuch as the plaintiff was not a "person to whom the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), applies."

The county court judge so held, and nonsuited the plaintiff. The plaintiff appealed.

Leonard, for the plaintiff. The object of the Employers' Liability Act, 1880, was, to do away with the doctrine of irresponsibility of the employer for injuries arising from negligence on the part of those engaged in a common employment with the person injured. The 8th section of that Act defines "workman" to mean "a railway servant, and any person to whom the Employers and Workmen Act, 1875, applies." Now, the interpretation clause, s. 10, of the Employers and Workmen Act, 1875, is as follows:—"The expression *workman* does not include a domestic or menial servant, but, save as aforesaid, means any person who,—being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age,—has

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entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour." The only direct decision upon the construction of that clause is one by the Court of Session in Scotland in a case of *Wilson* v. *The Glasgow Tramways and Omnibus Co.* (1), where it was held that a person in the position of this plaintiff is a "workman" within the meaning of the Act. The Lord Justice Clerk there says (2): "There is considerable want of precision in this clause. But I am of opinion that the pursuer was a workman in the sense of the statute. He was not a domestic servant. He was not other than a labourer employed to attend on the tramway cars, as much so as a miner employed to work a windlass or the gearing of a pit, or a man engaged to guide the horses of a track-boat on a canal. I am unable to draw any distinction which would not neutralize the Act altogether." And Lord Ormidale said (3): "Having regard to the terms of the 10th section of the Employers and Workmen Act, I can entertain little doubt that the pursuer is comprehended by it. He may not belong to any of the classes specially enumerated; but I can see no sufficient reason for holding that he does not fall under the general description of persons being servants engaged in manual labour; and I feel myself confirmed in this view by the circumstance that domestic or menial servants are expressly saved or excluded from the operation of the Act; the inference being thereby rendered irresistible, as it appears to me, that all other servants engaged in manual labour are comprehended: and it cannot be disputed that the pursuer, being occupied or employed as a guard to an omnibus or tramway-car, is acting as a servant engaged in manual labour." Lord Gifford, the other member of the Court, declined to express any opinion upon the point. This person is a "labourer;" he is engaged in "manual labour," that is, labour performed by the hand; he is a "journeyman," inasmuch as he is hired and paid by the day. What more can be necessary to bring him within the Act?

(1) Sessions Cases, 4th Series, vol. 5, p. 981. (2) At p. 988.
(3) At p. 989.

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[A. L. SMITH, J. Why are railway servants specifically mentioned in s. 8 of the Employers' Liability Act, 1880, in addition to the persons mentioned in the Act of 1875?]

Possibly because there are some railway servants who might not fall within the particular descriptions mentioned in s. 10 of the Act of 1875, but for the reference to which this case would be free from difficulty. In *Shaffers* v. *General Steam Navigation Co.* (1) the plaintiff and one Jones were employed with others by the defendants in loading sacks of corn into the hold of a ship. Jones's duty was to guide the jib of the crane by means of a guy-rope, and to give directions to the man who worked the crane when to lower and when to hoist. In consequence of Jones's omission to use the guy-rope, the jib swung round, and some sacks which were being lowered struck the combing of the hatchway, were thrown out of the sling, and fell down into the hold, breaking the plaintiff's leg. It was held that Jones was a person engaged in "manual labour."

[DAY, J. In construing the clause in question, there can be no distinction between the conductor and the driver of an omnibus. Would a gentleman's coachman who lives away from his master's house be within this clause?]

He would clearly fall within the definition of a "domestic servant," and would be so classed for payment of duty. The only reasonable construction of s. 10 of the Act of 1875, it is submitted, is, to read its words as including a person engaged as this plaintiff was. An omnibus is within the meaning of "plant" in s. 1, subs. 1, of the Employers' Liability Act, 1880.

Sir Hardinge Giffard, Q.C. (*Cock* and *Kingsford* with him), for the defendants. It is enough to say that the legislature when it passed the Employers' Liability Act, 1880, had no intention to repeal or destroy what is called the doctrine of "common employment." The sole question here is what is the true construction of s. 10 of the Employers and Workmen Act, 1875. That section is, no doubt, awkwardly framed. The words "manual labour" were in all probability originally applied to persons engaged in manufactures. "Workman" is a term of large and extensive appli-

(1) 10 Q. B. D. 356.

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cation in its ordinary sense. "Labourer" in itself is equally comprehensive. But, seeing who are the persons for whose benefit the Act was passed,—persons who are employed in the classes of labour specifically mentioned,—the more obvious meaning of "labourer" and "person engaged in manual labour" is, to apply it to persons employed in works ejusdem generis with those described. The title of the Act,—"To enlarge the powers of county courts in respect of disputes between employers and workmen,"—favours this construction. By the interpretation clause he must be, not a domestic or menial servant, but "a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or a person otherwise engaged in manual labour;" all of whom are employed in the performance of some act of physical labour in relation to a trade or business. How can it, without doing violence to the language used, be said that an omnibus conductor falls within any of the classes there described?

The construction put upon this clause by the Scotch Court, apart from other considerations, can hardly be binding upon this Court, seeing that those learned judges had not the light of the statutory declaration contained in s. 8, subs. 3, of the Employers' Liability Act, 1880, that a "railway servant" is to be included in the expression "workman." The guard of a railway train performs analogous duties to those of a conductor of an omnibus: why was he not within the definition in s. 10 of the Act of 1875?

Leonard, in reply. The case of *Wilson* v. *The Glasgow Tramways and Omnibus Co.* (1) is precisely in point: and it would be highly inconvenient if the construction of an Act of Parliament which applies to the whole kingdom should be different on this side of the Tweed from that which prevails on the other side. It may be conceded that the doctrine of common employment, under *Priestley* v. *Fowler* (2) and the cases which followed it, is not entirely destroyed by the Employers' Liability Act, 1880.

DAY, J. I think this rule should be refused. I am clearly of opinion that the judgment of the county court was correct. The

(1) Sessions Cases, 5th Series, vol. 5, p. 981. (2) 3 M. & W. 1.

question must be determined upon the construction of s. 10 of the Employers and Workmen Act, 1875. We have been much pressed with a decision of the Court of Session in Scotland. Now, although that case is not an authority which is absolutely binding upon us, the Court of Session not being for this purpose a Court of co-ordinate jurisdiction with ourselves, far be it from me to say that the decisions of that Court are not entitled to receive the greatest consideration and respect at our hands. It has been strongly urged that it would be inconvenient if a different law were to prevail on this side of the Tweed from that which is administered on the other side. If that be so, it is an inconvenience which has subsisted for a very long time; and I do not anticipate that any very grave inconvenience will result if we take a different view of the meaning of an Act of Parliament from that which the judges who preside in the Scotch Courts do: and possibly, if the learned lords who decided *Wilson* v. *The Glasgow Tramways and Omnibus Co.* (1) had had this case before them, they would have come to the same conclusion that we have come to. The majority of the Court in that case held that an omnibus conductor was a "labourer" within the meaning of the Act which they were called upon to construe. It may be that there was evidence before them on the subject. I unhesitatingly come to the conclusion that this omnibus conductor is not a "labourer" within s. 10 of the Act of 1875; and I arrive at this conclusion without any reference to the Employers' Liability Act, 1880. I protest against the argument of Sir Hardinge Giffard as to that. I can understand that an earlier statute may be referred to for the purpose of throwing light upon the construction of a provision in a subsequent statute; but I cannot follow his reasoning as to construing the language of an earlier statute by that of a subsequent Act. The meaning of s. 10 of the Act of 1875 is to be determined by the words used in that section: the 8th section of the Act of 1880 cannot be looked at to explain what the legislature meant in 1875. Now, looking at the words of s. 10 of the Act of 1875 alone, I find nothing in them to include this plaintiff. The expression "workman" does

(1) Sessions Cases, 5th Series, vol. 5, p. 981.

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not include a domestic or menial servant; but, save as aforesaid, means any person who, "*being* a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, has entered into or works under a contract with an employer." Is this man a "labourer?" In one sense, every man who works or labours may be called a labourer; but it cannot be said that he is therefore within the statutory definition of a "workman." Then, is this person a journeyman? Etymologically considered, a journeyman is one who is employed by the day; but that is not the sense in which the term is ordinarily used, for, in most trades where journeymen are employed,—butchers, bakers, and tailors, for instance,—they are hired and paid by the week. In common parlance, no one would call an omnibus conductor a journeyman. Neither is he an artificer or handicraftsman. And the general words "or otherwise engaged in manual labour," refer to labour ejusdem generis with the specific kinds before mentioned. It seems to me, therefore, that an omnibus driver or conductor is not within any of the definitions of a "workman" in s. 10 of the Employers and Workmen Act, 1875. The ingenious and exhaustive argument of Mr. Leonard has failed to convince me that the ruling of the county court judge was wrong.

A. L. SMITH, J. Upon the whole I agree with my Brother Day that the ruling of the county court judge in this case was right. It is conceded that the doctrine of common employment, as it is called, is not gone altogether, but still subsists in some cases and for some purposes. I give no opinion as to where the line is to be drawn. The simple question we have to consider is whether an omnibus conductor is within the Employers' Liability Act, 1880. The only point upon which I incline to differ from my Brother Day is, that, in considering who is a "workman," we must ignore the Act of 1880. To that proposition I cannot assent. The 8th section of the last-mentioned Act says, "The expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies." Now, the interpretation clause of the Act of 1875 says, "The expression

workman does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, has entered into or works under a contract with an employer," express or implied. All these persons, plus railway servants, are workmen within the Employers' Liability Act, 1880. I entirely agree with my Brother Day that "labourer" cannot in its ordinary acceptation include an omnibus conductor; and I think it equally clear that he cannot be included in the term "journeyman." Then, is he a person "otherwise engaged in manual labour" within the meaning of s. 10 of the Act of 1875? I think not. The mere fact that a man works with his hands is not enough to constitute him a workman within that section. I think, for these reasons, that the decision of the county court judge was right; and I cannot accept the reasoning of the learned judges of the Scotch Court of Session.

DAY, J. I desire to withdraw an expression of opinion that the Employers' Liability Act, 1880, is not to be taken into consideration in determining the meaning of the words used in s. 10 of the Employers and Workmen Act, 1875. Regard must be had to both of those Acts.

Rule discharged.

Solicitors for plaintiff: *Mackreth, Bramall, & White.*
Solicitors for defendants: *Harries, Wilkinson, & Raikes.*

J. S.

1884
Jan. 18.

[IN THE COURT OF APPEAL.]

GIBBS AND OTHERS *v.* THE GREAT WESTERN RAILWAY COMPANY.

Master and Servant—Negligence—Common Employment—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 5—*Railway Company—Person having "Charge or Control" of Points.*

In an action for compensation under the Employers' Liability Act, 1880, the evidence shewed that it was the duty of F., a workman employed in the signal department of the defendants' railway, to clean, oil, and adjust the points and wires of the locking apparatus at various places along a portion of the line, and to do slight repairs, that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the points and locking gear, which were moved and worked by men in the signal boxes, being kept in proper condition, and that F. having taken the cover off some points and locking gear in order to oil them, negligently left it projecting over the metals of the line whereby injury was caused to a fellow workman:—

Held, affirming the decision of the Queen's Bench Division, that there was no evidence for the jury that F. had "charge or control" of the points within the meaning of s. 1, sub-s. 5, of the Employers' Liability Act, 1880, so as to make the defendants liable for his negligence.

APPEAL by the plaintiffs from the decision of the Queen's Bench Division making absolute a rule nisi to set aside a verdict for the plaintiffs, and to enter a nonsuit on the ground that there was no evidence of liability on the part of the defendants under the Employers' Liability Act, 1880. The action was brought in the Marylebone County Court by the widow and children of George Gibbs, to recover compensation in respect of personal injury resulting in death, sustained by Gibbs whilst in the defendants' employment.

The material facts appearing on the judge's notes are stated in the report of the case before the Queen's Bench Division. (1) The sole question for the purpose of the present report is, whether there was evidence to go to the jury that one Fisher, a fellow workman with Gibbs, in the employment of the defendants, by whose negligence the injury had been caused, was a person having "the charge or control" of points upon the railway

(1) 11 Q. B. D. 22.

within the meaning of s. 1, sub-s. 5, of the Employers' Liability Act, 1880. As to this, Fisher's evidence-in-chief was as follows:—"I am employed by the company in the signal department, and have charge of the locking apparatus. A youth was working under me. My duty is to clean, oil, and adjust the points and wires, and keep them oiled, and to see that the boy does his work." His evidence on cross-examination was: "My duties are to clean and oil the locking bars and apparatus. I had several places to go to. I worked under inspector Saunders. A boy worked with me. I was not to say a foreman, only to this boy foreman of the cleaning. I did the cleaning, oiling, and adjusting with my own hand." The defendants called witnesses, and one of them, Townsend, an assistant engineer of the railway, said, "Fisher's duty was to oil the joints and lock lines, and do anything else in connection with the signals. He is little above a labourer. He has no charge of or control over the points. They are worked from the signal box," and another of the witnesses, Saunders, said, "I am inspector in the signal department of the Great Western Railway Company. Fisher is one of my men. His duties are to clean and oil all in connection with the locking gear at twelve places on six or seven miles of line. He has a boy under him. Fisher's wages are 4*s.* a day, or 24*s.* a week. He has no control over the points. They are moved from the signal box. Fisher had to do slight repairs. I should go over the work every week, sometimes every day, to see that he did his duty."

T. L. Wilkinson, for the plaintiffs. There was evidence that Fisher had "charge" of the locking apparatus and points, and so he was a person having such charge within the meaning of s. 1, sub-s. 5, of the Employers' Liability Act, 1880. It is sufficient for that purpose that he should have "the charge," and it is not necessary that he should have "the control," nor is it necessary that he should habitually have the charge, if the accident occurred whilst he had the charge.

[BRETT, M.R. According to the evidence called for the plaintiffs, Fisher worked under Saunders. How can he therefore be the person who had the charge of the locking apparatus or points?

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It is not enough that he should say he had the charge. It must be shewn that his duties were such as that he should have the charge of the points within the meaning of the enactment.]

There is evidence that in discharge of his duty to keep them oiled he had in a certain sense charge of them.

Webster, *Q.C.*, and *Wightman Wood*, appeared for the defendants, but were not called upon.

LORD COLERIDGE, C.J. In this case we have to put a construction upon the 5th sub-section of the 1st section of the Employers' Liability Act, 1880, which enables a workman to recover from his employer for an injury inflicted upon him "by reason of the negligence of any person in the service of the employer, who has the charge or control of any signal, points, locomotive engine, or train upon a railway." It is, as the Master of the Rolls has pointed out, for the plaintiffs to make out that they are entitled to recover under the words of this section. Now the person who did the mischief was a man called Fisher, and the way he did the mischief was this: it being his duty to oil from time to time certain machinery contained in a box which was connected with the points, he took off the cover of the box, and having laid it on the permanent way of the railway, he left it there forgetting that he had done so, and the consequence was that a train came by, was knocked off the line, and the engine-driver whom the plaintiffs represent was killed. The first question is, had Fisher the charge or control of any signals? It is clear he had not. He had nothing to do with signals at all, either in the working or cleaning them. Then had he the charge or control of any points? He certainly had to do something from time to time to the machinery connected with the points, but he himself said he worked under the direction of Saunders, and Saunders was called and he proved, I think, that he was the person who had apparently both the charge and the control of the points, and that Fisher was only a workman under him, and was not a person who had either the charge or the control of any points connected with the railway. I entirely agree that it would not be proper for the Court to give a narrow construction to an Act of Parliament which was intended to do away with

what many persons felt to be rather a blot on the law, but nevertheless the words of the enactment should be construed according to ordinary rules; and should not be extended beyond their plain meaning. Here, as my Brother Mathew put it in the Court below, and what was really the fact, Fisher, who acted under the orders of the person who had the charge and control of these points, was held by the jury to be a person who had the charge and control of the points himself. To hold this, would be to extend the words of the Act of Parliament. The Court below were right in making absolute a rule to enter a nonsuit, and their judgment ought to be affirmed.

BRETT, M.R. The action in this case was brought by the representatives of the deceased man for the benefit of hi ; widow and children under Lord Campbell's Act, and upon the trial the County Court Judge left two questions for the jury, which if there had been evidence in support of them, would, in my opinion, have been proper questions for the jury. He asked the jury to say, first, whether Fisher was a person having the charge or control of the points upon the railway, and secondly, whether he had been guilty of negligence which caused the death of Gibbs. The question is, whether there was any evidence in support of those questions. As to the last, it has not been suggested that there was not evidence of negligence on the part of Fisher, but it is said there was no evidence to go to the jury as to the first question, whether he was a person who had either the control or the charge of the points within the meaning of the statute. Now the Act of Parliament has not made employers liable to any one of their workmen for the negligence of all his fellow workmen, but only for the negligence of some of them, and the question is, whether Fisher is one of those for whose negligence the employers are liable to one of Fisher's fellow workmen. This Act of Parliament having been passed for the benefit of workmen, I think it is the duty of the Court not to construe it strictly as against workmen, but in furtherance of the benefit which it was intended by Parliament should be given to them, and therefore as largely as reason enables one to construe it in their favour and for the furtherance of the object of the

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Act. But even taking that into account, the burden of proof in such a case as this is upon the plaintiffs to shew that the negligence was that of a fellow workman, for whose negligence the employers are made liable by the statute. It therefore lay on the plaintiffs to shew that Fisher was a workman who had the charge or control of the points, for it is obvious he had nothing to do with the signals, and the whole question is with regard to the points.

Now I cannot think that there is any colour for saying he had the control of the points, and the only question is whether he is a person who had the charge of them within the meaning of the statute. I think that to be such a person he should be one who has the general charge of the points, and not one who merely has the charge of them at some particular moment. Now what evidence is there that Fisher was a person who had such general charge? It is true that he himself said he had the charge, but to act upon such evidence would be to make him the judge of the law and not the witness of facts. The plaintiffs were bound to shew by evidence what were the duties of this man, when it would be for the Court to say whether having such duties he was a person who had the charge of the points as intended by the statute. Fisher himself, when cross-examined, said what his duties were, "my duties are," he said, "to clean and oil the locking bars and apparatus. I had several places to go to, I worked under Inspector Saunders." The meaning of working under Saunders, is that Saunders might order him at any moment to go to such and such a place and oil the bars and apparatus there, or not to go to the place he had intended to go to for the purpose of oiling the bars. The evidence which was given, shewed, I think, that Fisher was only a little above a labourer, that he had to do manual work on what he was told to look to; and that he was not a person who had the charge of those things upon which he had to do such work under such circumstances. The Queen's Bench Division, therefore, rightly held that there was no evidence to support the plaintiffs' case.

BOWEN, L.J. I agree. There is nothing in the evidence to shew that Fisher either had the charge or the control of

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these points. It does not seem to me necessary now to decide what persons may fulfil the prescribed definition of the Act as being persons having the charge or control of the points. It is sufficient to say that Fisher was only at the most employed to do certain work on, and in respect of, the points under the order of somebody else. He cannot, therefore, have been the person himself who had the charge or the control of them.

Appeal dismissed.

Solicitors for plaintiffs: *R. Elgood.*
Solicitor for defendants: *E. R. Nelson.*

W. P.

1883
Dec. 13.

[IN THE COURT OF APPEAL.]

SCARLETT *v.* HANSON AND ANOTHER.

Sheriff—Seizure in Execution—Equity of Redemption—Duty of Sheriff—Common Law Procedure Act, 1860 (23 & 24 *Vict. c.* 126), *s.* 13.

Where goods seized in execution by a sheriff under a fi. fa. have been previously assigned by the execution debtor to a third person as security for a debt, the sheriff is not bound to interplead and thereby enable proceedings to be taken for an order to sell being made by a judge under s. 13 of the Common Law Procedure Act, 1860, but is at liberty to withdraw, though the value of the goods seized exceed the sum secured by the bill of sale, and the execution debtor therefore has an equity of redemption which is valuable.

ACTION by the plaintiff against the defendants as the Sheriff of Middlesex, for not levying under a writ of execution upon a judgment recovered by the plaintiff against one Auguste Thoumire for 44*l.* 6*s.* 2*d.*, and for making a false return of nulla bona. The action was tried before Manisty, J., without a jury, at the Hilary Sittings of 1883.

The facts were shortly the following: The writ of fi. fa. indorsed to levy the said sum of 44*l.* 6*s.* 2*d.* was lodged with the sheriff on the 23rd of December, 1881, and the sheriff's officer on the following day went to the premises of A. Thoumire, the execution debtor, and seized all the goods and effects on the premises. There was already a distress in for rent for 52*l.* 10*s.*, and also a man was in possession under a bill of sale given by the

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execution debtor to the Tavistock Street Union Deposit Bank for securing 95*l.*, and the sheriff's officer, being of opinion that the bill of sale was valid and that the amount due under it, independently of the rent distrained for, was more than the value of the goods, withdrew from possession, and the sheriff, being afterwards ruled by the plaintiff to return the writ, returned nulla bona. The execution debtor subsequently went into liquidation, and his goods were sold for a price which exceeded by 100*l.* the amount of rent distrained for and of the debt due under the bill of sale.

It was contended for the plaintiff at the trial that it was the duty of the sheriff, not only to have seized the goods but to have obtained a judge's order for their sale, pursuant to s. 13 of the Common Law Procedure Act, 1860. (1) The learned judge, however, was of opinion that the 13th section gave the sheriff no power to sell, and that the plaintiff had no cause of action, and therefore he ordered judgment to be entered for the defendants. The plaintiff appealed.

R. V. Williams, for the plaintiff. It is true that before the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), goods could not have been seized in execution which the debtor had previously assigned by a valid bill of sale by way of mortgage, but the intention of the legislature under s. 13 of that statute was to make an equity of redemption available for an execution creditor. This is irrespective of any option on the part of the sheriff.

[BRETT, M.R. Who is to make an application to a judge under that 13th section for an order to sell?]

No one is specified by the statute, but in practice the order is

(1) By s. 13 of 23 & 24 Vict. c. 126, "When goods or chattels have been seized in execution by a sheriff or other officer under process of the above-mentioned Courts, and some third person claims to be entitled under a bill of sale, or otherwise, to such goods or chattels by way of security for a debt, the Court or a judge may order a sale of the whole or part thereof upon such terms as to payment of the whole or part of the secured debt, or otherwise, as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such Court or judge may seem just."

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made on an interpleader summons. Sect. 12 is headed "interpleader proceedings," and all the sections following to s. 18 are sections relating to interpleader proceedings, so that it is plain that the order under s. 13 is to be made on an interpleader summons.

[BRETT, M.R. Do you say that a sheriff can in no case withdraw, but that he must in all cases interplead?]

No, it is not necessary to contend so much as that, but where the goods which have been taken by the sheriff under the execution are of that value that notwithstanding they are mortgaged the debtor has an interest in them, it is the duty of the sheriff to bring this before the notice of the Court or judge, so that an order for the sale may be made under this 13th section. The statute, as appears from its preamble, was passed to enlarge the jurisdiction of the Court, so by necessary implication the sheriff, who is one of its officers, has his duties amplified. In the present case he ought not to have withdrawn, and his return of nulla bona was untrue.

Cock (*C. Scott* with him), for the defendants. Before the Common Law Procedure Act, 1860, it is clear that an equity of redemption could not have been taken in execution: Watson on Office of Sheriff, 2nd ed., p. 256, where, in a note, it is said, "the proper remedy for the plaintiff in that case is by filing a bill in equity to redeem the estate by paying off the principal and interest due on the mortgage." It is more than twenty years since the Act of 1860 was passed, and it has never been suggested until now that it imposed any fresh duty on the sheriff.

[BOWEN, L.J. Suppose the judge were to refuse to make an order to sell, what justification could the sheriff plead to an action of trespass by the bill of sale holder?]

He could not successfully plead any.

[He was then stopped.]

BRETT, M.R. In this case certain goods were seized in execution by the sheriff, whereupon a third person came forward and claimed them, and produced a bill of sale which he had over all the goods so seized. There was nothing apparently against the validity of the bill of sale, and as the sheriff's officer had no

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doubt but that the bill of sale was good he withdrew. The sheriff afterwards on being called upon to make a return to the writ, returned nulla bona, that is, that he had no goods in his bailiwick belonging to the debtor which were available for execution. It appears now, however, and it must be taken as the fact, that if the goods seized had been sold they would have realized more than enough required to pay the rent and the sum secured by the bill of sale, so that there was an equitable right in the debtor to a sum of money. Under these circumstances it has been alleged on the part of the plaintiff that the sheriff ought not to have withdrawn, and that he made a false return.

It has not been disputed, I think, nor could it be, that if before the Common Law Procedure Act, 1860, the sheriff had done what he did in the present case, he would have done what was right. According to law the property in the goods seized had previously passed by the bill of sale to another person, and as the sheriff could only take in execution goods which were the property of the execution debtor, and the goods seized were not such, it was the duty of the sheriff to withdraw. If the sheriff had any doubt whether the claim to the goods by a bill of sale holder was a good one, he could have interpleaded, when the judge might have ordered him to withdraw, and this he might have ordered, whether the goods were sufficient or not to satisfy the claim of the bill of sale holder, but he could only have ordered him to withdraw, although the value of the goods was more than sufficient to have satisfied the bill of sale holder. The 13th section of the Common Law Procedure Act, 1860, was passed to obviate this, and it gives a power to the Court or a judge to order a sale of the goods, but it gives such power to the Court or judge only, and does not alter the duty of the sheriff. It is said, however, that by implication that section gives to the sheriff not only the power but the duty to seize something which he had no right to seize before that Act. The seizure might be excusable if the judge made an order to sell under that 13th section, but the section gives the sheriff no power to seize. It is said on the part of the plaintiff that by implication it gives the sheriff a power to seize and hold the goods until the claimant has had an opportunity of going before a judge and obtaining an order to sell,

but how is this to be done, except on an interpleader summons, and if the argument on the part of the plaintiff is good it must come to this: that the sheriff in such a case as the present is obliged to take out an interpleader summons. That is, I think, a strong thing to say or to imply from this enactment. The sheriff has to seize the goods of the execution debtor, but where there is, as there was here, a bill of sale, and consequently the bill of sale holder has the legal and beneficial interest in the goods, it would be strange if the sheriff could seize such goods when they belong to one who is not the person against whom the process of execution issued, because the person against whom it issued has also some beneficial interest in the goods. The Court has been asked to presume that the legislature meant by this enactment to imply this. There is great difficulty in presuming anything of the kind, and certainly there is nothing in the Act which says that the sheriff must seize such goods and interplead. The sheriff is bound to obey the writ. He cannot sell goods which are not those of the debtor, but to which another person is entitled under a bill of sale, without the order of the Court or judge. So far, therefore, from thinking that this s. 13 gives the sheriff any power or duty by implication, I think it means what it says, and that it does not in any way alter the power or duty of the sheriff. In my opinion the judgment of Manisty, J., was right, and this appeal must be dismissed.

BAGGALLAY and BOWEN, L.JJ., concurred.

Appeal dismissed.

Solicitor for plaintiff: *C. E. Butterfield.*
Solicitors for defendants: *Maynard & Burchell.*

W. P.

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Dec. 18.

[IN THE COURT OF APPEAL.]

BURTON & Co. *v.* ENGLISH & Co.

Ship—General Average—Charterparty—Deck Cargo jettisoned—"At merchant's risk."

It was stipulated in a charterparty that the "ship should be provided with a deck cargo if required at full freight, but at merchant's risk":—

Held, reversing the decision of the Queen's Bench Division, that the words "at merchant's risk" did not exclude the right of the charterers to general average contribution from the shipowners in respect of deck cargo, shipped by the charterers, and necessarily jettisoned to save the ship and the rest of the cargo.

APPEAL by the plaintiffs from the decision of the Queen's Bench Division ordering judgment to be entered for the defendants.

The action was by the shippers of a cargo of iron and wood on a steamer they had chartered of the defendants, the shipowners, on a voyage from a Baltic port to London, to recover a general average contribution from the shipowners for the jettison of a deck cargo of timber. By the charterparty it was stipulated that "the steamer shall be provided with a deck load if required at full freight, but at merchant's risk," and it was admitted that such cargo was properly and necessarily jettisoned to save the ship and the rest of the cargo, and also that by reason of a custom to carry deck cargoes of timber on similar voyages, the shipowners were liable unless protected by the above stipulation in the charterparty. The Queen's Bench Division held that the words at "merchant's risk" excluded the right of the plaintiffs to general average contribution, and gave judgment therefore for the defendants. The special case containing the facts is substantially set out in the report of the case in the Queen's Bench Division (1).

Cohen, Q.C., and *J. G. Barnes*, for the plaintiffs. The claim for contribution for the jettison of a deck cargo could not be maintained, if there had not been the custom to carry such cargoes on these

(1) 10 Q. B. D. 426.

voyages from a Baltic port: *Wright* v. *Marwood* (1). There being then this custom, the defendants are admittedly liable unless exempted by these words "at merchant's risk" in the stipulation in the charterparty. The question therefore is, what is the meaning of the words? It cannot mean to free the shipowners from all liability, but only from liability from any risk under the contract to carry: *Schmidt* v. *Royal Mail Steamship Co.* (2); *Crooks* v. *Allan* (3); and *McCawley* v. *Furness Railway Co.* (4)

Myburgh, Q.C. (*Webster, Q.C.*, with him), for the defendants. The words "at merchant's risk" do not refer to the carrier's liability, for it is not in that part of the charterparty which relates to the carriage. It was intended to refer to, and clearly does refer to, the liability to contribute to general average, for the perils of the sea, &c., are excepted expressly by the usual exception against those risks in the charterparty, and therefore there is no other risk to which these words could apply.

BRETT, M.R. In this case the plaintiffs, timber merchants, shipped on the defendants' vessel a cargo of timber, part of which was deck cargo, and also a cargo of iron, under different contracts. The ship had been chartered by the plaintiffs, but the goods were shipped under a bill of lading which referred to the charterparty. During the voyage part of the deck cargo was jettisoned for the safety of the vessel and rest of the cargo, and this action has been brought for general average contribution against the shipowners, and it has been contended that they are not liable by reason of a stipulation in the charterparty. The first thing to be noticed is that the ship was not a general ship, but one which took only these two cargoes of iron and timber. The clause in the charterparty on which the defendants rely is as follows: "the steamer shall be provided with a deck load if required at full freight, but at merchant's risk." It is obvious that this is a stipulation in favour of the shipowners, for in order to earn a larger freight they may require part of the cargo to be deck cargo, and then it is to be at the merchant's risk. My brother Cave, who delivered the judgment

(1) 7 Q. B. D. 62.
(2) 45 L. J. (Q.B.) 646.
(3) 5 Q. B. D. 38.
(4) Law Rep. 8 Q. B. 57.

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of the Divisional Court, held that this stipulation absolved the shipowners from liability to contribute to general average. It must be admitted that if there were an improper jettison by the master and crew, this stipulation would relieve the shipowners from liability, and therefore my brother Cave felt this difficulty, that if the shipowners were to be held liable to contribute to general average in respect of jettison of any of this cargo, this strange result would seem to follow, namely, the shipowners would not be liable for an improper jettison, but they would be for a jettison properly and rightly made. We have to say if we agree with the decision of the Divisional Court. The stipulation is in favour of the shipowners, and is in restriction of their liability under their contract to carry. The general rule is that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made. Now by what right is it that the owner of cargo can make the shipowner liable to contribute in respect of its loss? If the liability is in consequence of any act of any of his servants for which the shipowner would be liable but for this stipulation, then it follows that the defendants are freed from liability. I should say that this stipulation would cover any act of the master or crew, which being done by them as servants of the shipowner would otherwise make him liable; it therefore covers the case of improper jettison, also a loss caused by a collision or stranding owing to the negligence of the master or crew. Does it, however, cover this claim for contribution? How does such a claim arise? In theory it arises from an act done by the master of the ship, not as the servant of the shipowner, but as the servant of the cargo owner, a relation which is imposed on him by the necessity of the case. It arises by reason of a voluntary sacrifice by the cargo owner for the benefit of the ship and cargo, and not from any act done by the shipowner at all. By what law does the right arise to general average contribution? Lord Bramwell in his judgment in *Wright* v. *Marwood* (1) considers it to arise from an implied contract, but although I always have great doubt when I differ from Lord Bramwell, I do not think that it forms any part of the contract to carry, and that it does not arise

(1) 7 Q. B. D. 62, at p. 67.

from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved. If this be so, the liability to contribute does not arise out of any contract at all, and is not covered by the stipulation in the charterparty on which the defendants rely. I therefore disagree with the decision of the Divisional Court in this case. The difficulty which my brother Cave felt as to the meaning of the words in the charterparty does not arise, because the acts of the captain with reference to properly or improperly jettisoning part of the cargo are not both done by him in the same capacity, one is done by him as the agent of the cargo owner, and the other as the servant of the shipowner. For these reasons I think that the liability to general average contribution is not covered by any words of the contract in the charterparty, and consequently that the defendants are liable.

BAGGALLAY, L.J. I am of the same opinion. The question has arisen in consequence of the introduction into the charterparty of the words "the steamer shall be provided with a deck load if required at full freight, but at merchant's risk," and that condition is incorporated into the bill of lading which we are now considering. Now I do not understand that the Divisional Court dissented from the general principle laid down by Lord Justice Lush, then Mr. Justice Lush, in *Schmidt* v. *Royal Mail Steamship Co.* (1) and *Crooks* v. *Allan* (2), "that the office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities for general average, and that, unless the contrary appears, the words must be construed with reference to the contract to carry." Adopting that principle, the Court below proceeded to consider whether there was anything to the contrary in the particular case then under consideration. Now I draw a different inference as far as regards the circumstances of the case to those which the

(1) 45 L. J. (Q.B.) 646. (2) 5 Q. B. D. 38.

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Court below drew. Therefore, quite agreeing with it as far as regards the principle, I differ from it as to the mode in which it is applied. I think, therefore, the appeal must be allowed.

BOWEN, L.J. It seems to me that this case raises a question upon the construction of the charterparty owing to the reference which is made to it in the bill of lading. That being so, the first matter which we have to discuss is, whether there are any and what rules or maxims to be brought to bear upon the interpretation of either document. First of all we are presented with a canon by the late Lord Justice Lush, in *Crooks* v. *Allan* (1), where, adopting the words he himself used in the case of *Schmidt* v. *Royal Mail Steamship Co.* (2), he says, "the office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry and is not concerned with liabilities to contribution in general average." Now the first remark which I desire to offer upon that proposition is, that it is not, strictly speaking, a rule of law. Nobody can lay down a universal rule of law for the interpretation of charterparties or of bills of lading. In my view it really is a wise observation brought to bear upon the construction of a mercantile document in ordinary mercantile use from the experience of those who are conversant with such business. It is a practical canon, not a rule of legal interpretation; but still it deserves all the weight which the great authority of Lord Justice Lush would give it. There is in the second place another rule of construction which one would bring to bear upon this charterparty, and that is, that one must see if this stipulation which we have got to construe is introduced by way of exception or in favour of one of the parties to the contract, and if so, we must take care not to give it an extension beyond what is fairly necessary, because those who wish to introduce words in a contract in order to shield themselves ought to do so in clear words. Now the words we have to construe are these: after providing in the earlier part of the charterparty that "the ship is to load from the factors of the merchant a full and complete cargo," &c., &c., it states that "the steamer shall be provided with a deck load if required at full freight, but at

(1) 5 Q. B. D. 38, at p. 40. (2) 45 L. J. (Q.B.) 646.

merchant's risk." Now that clearly is a stipulation in favour of the shipowners, and primâ facie it seems to me meant to relieve them from the responsibility of some act of their servants by which they would otherwise be bound, and from the incidents of some risk which otherwise would fall upon them as carriers and under their contract of carriage. It would, I think, clearly cover improper jettison, also it would cover negligence of the captain or crew, occasioning stranding or collision, and any other acts, if any there be, of the servants of the shipowners for which they would otherwise be responsible.

But does it cover this claim for general average contribution? What is this claim, and how does it arise? In the investigation of legal principles the question whether they arise by way of implied contract or not often ends by being a mere question of words. General average contribution is a principle which comes down to us from an anterior period of our history, and from the law of commerce and the sea. When, however, it is once established as part of the law, and as a portion of the risks which those who embark their property upon ships are willing to take, you may if you like imagine that those who place their property on board a ship on the one side, and the shipowner who puts his ship by the quay to receive the cargo on the other side, bind themselves by an implied contract which embodies this principle, just as it may be said that those who contract with reference to a custom impliedly make it a portion of the contract. But that way, although legally it may be a sound way, nevertheless is a technical way of looking at it. This claim for average contribution, at all events, is part of the law of the sea, and it certainly arises in consequence of an act done by the captain as agent not for the shipowner alone, but also for the cargo owner, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo. He makes the sacrifice on behalf of one principal, whose agent of necessity he is, on the implied terms, if you like to call it so, that that principal shall be indemnified afterwards by the rest. That, however, is not the class of shipowner's risk which I think these words in the charterparty are intended to cover, though I do not consider the point clear, because it is a timber contract in the Baltic, at many or most of

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which ports there is a custom to load deck timber, and to contribute to the jettisoning if it ever become necessary to jettison it. It is difficult at first sight to free oneself from the idea that those who drew this contract were thinking of the jettison of a deck load of timber. But still, what is the sound principle to apply? Why, it is that those who wish to make exceptions in their own favour, and by which they are to be relieved from the ordinary laws of the sea, ought to do so in clear words; and on that principle I think this case ought to be decided, and my judgment goes upon the basis that the terms used here are not clear enough to absolve the shipowners.

Judgment reversed.

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*
Solicitor for defendants: *H. C. Coote.*

W. P.

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[IN THE COURT OF APPEAL.]

HOUGH *v.* WINDUS.

Judgment Creditor—Writ of Elegit—Seizure but not delivery of the Goods—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 146, 169.

By the Bankruptcy Act, 1883, s. 146, "the sheriff shall not under a writ of elegit deliver the goods of a debtor, nor shall a writ of elegit extend to goods," and by s. 169, which repeals amongst other enactments so much of 13 Edw. 1, c. 18, as relates to the chattels of the debtor save only his oxen and beasts of the plough, it is enacted that "the repeal effected by this Act shall not affect any thing done before the commencement of this Act under any enactment repealed by this Act; nor any right or privilege acquired or duty imposed, or liability or disqualification incurred under any enactment so repealed." Some days before the 1st of January, 1884, when the Bankruptcy Act, 1883, came into operation, the sheriff entered into possession and seized goods of the defendant, under a writ of elegit issued under statute 13 Edw. 1, c. 18, at the suit of the plaintiff, a judgment creditor of the defendant, but no delivery of such goods had been made to the plaintiff before the 1st of January, 1884:—

Held, reversing the decision of the Queen's Bench Division, that the Bankruptcy Act, 1883, had not deprived the plaintiff of his right to the delivery of such goods.

THE plaintiff, a judgment creditor of the defendant for 2300*l.*, issued on the 20th of December, 1883, a writ of elegit against

the defendant's goods under the Statute of Westminster the Second (13 Edw. 1, c. 18), and on the 22nd of December, 1883, the sheriff of Middlesex, to whom the writ had been delivered, entered and took possession of the defendant's goods at Millwall. An inquisition jury was summoned to value the goods, but the valuation proceedings were not completed, and delivery of the goods to the plaintiff was not made before the 1st of January, 1884, when the Bankruptcy Act, 1883, came into operation.

The Queen's Bench Division, being of opinion that the Bankruptcy Act, 1883, prevented the plaintiff from being entitled to a delivery of the goods, made an order that the sheriff should withdraw, and that he and the plaintiff should be restrained from taking any further proceedings under the said writ of elegit.

The plaintiff appealed.

The case was first argued on the 12th of January last before Brett, M.R., and Bowen, L.J., who not being able to come to a decision ordered that it should be reargued before the full Court of Appeal; it was reargued accordingly on the 18th of January last by

J. D. Walker, for the plaintiff.
Herbert Reed, for the defendant.
T. L. Wilkinson, for the sheriff.

The arguments are sufficiently stated in the judgments of the Lord Chancellor and Bowen, L.J. The following authorities were cited: *Payne* v. *Drewe* (1), *Wilbraham* v. *Snow* (2), Bac. Abr. title Execution D, *Clerk* v. *Withers* (3), *Ex parte Abbott* (4), *Semayne's Case* (5), and *Towler* v. *Chatterton*. (6)

Cur. adv. vult.

Jan. 30. LORD COLERIDGE, C.J. The judgment of the Lord Chancellor which I am now about to read embodies my reasons for the conclusion at which the Court has arrived. It is as follows:—

In this case a writ of elegit was issued at the suit of the

(1) 4 East, 523.
(2) 2 Wm. Saund. 47, n. 1.
(3) 6 Mod. 292.
(4) 15 Ch. D. 447.
(5) 5 Rep. 91.
(6) 6 Bing. 258.

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appellant, a judgment creditor, for 2300*l.*, against goods of the respondent, under the Statute of Westminster (13 Edw. 1, c. 18), on the 20th of December, 1883. The sheriff took possession on the 22nd of December, 1883. The effect of this proceeding, as the law stood at that time, was to entitle the creditor to delivery of the goods seized, to an amount (to be ascertained by appraisement) sufficient to satisfy his debt. In *Ex parte Abbott* (1) it was determined by the Court of Appeal, that, under similar circumstances, the creditor acquired a specific interest, before appraisement, in the goods seized, which a bankruptcy, then intervening, did not defeat.

There is, in this case, no bankruptcy; but it is contended, and it has been decided by the Court below, that the effect of the present Bankruptcy Act (passed on the 25th of August, 1883), which came into operation on the 1st of January, 1884, is to deprive the judgment creditor of the right to delivery of the goods, given to him by the Statute of Westminster.

In *Ex parte Abbott* (1), James, L.J., said, that this kind of proceeding against goods and chattels, by way of elegit, was "an absurd anachronism," which he hoped to see soon abolished by the legislature. This has now been done, so far, at all events, as relates to any writ of elegit issued after the 31st of December, 1883. But the question is, whether the effect of the statute has also been to intercept from a judgment creditor the fruits of such a writ, previously issued, under which the sheriff was, on that day, lawfully in possession? The legislature might, if it thought fit, have put an end to that form of process against goods and chattels immediately on the passing of the Bankruptcy Act, and before the time appointed for the commencement of its general operation. But this was not done. It is beyond controversy that a writ of elegit might, at any time between the 25th of August, and the 1st of January, 1884, have been issued against goods and chattels, and duly executed by delivery; and that the title of the creditor to goods so delivered would have been unaffected by the Act.

The enactment, which is supposed to have had the effect of wholly nullifying the right which the creditor had, in this case,

(1) 15 Ch. D. 447.

acquired before the new law came into operation, is contained in the latter (the 146th) of two sections (under the heading "Executions"); both independent of bankruptcy. The 146th section is thus expressed: "(1.) The sheriff shall not under a writ of elegit deliver the goods of a debtor, nor shall a writ of elegit extend to goods. (2.) No writ of levari facias shall hereafter be issued in any civil proceeding." Unless there be anything else in the Act to require a different construction, or some demonstrable repugnancy or inconsistency, I should myself have thought the rule "Omnis nova constitutio futuris formam imponere debet, et non præteritis," applicable to an enactment so expressed; applicable, (that is,) with reference to the day appointed for the Act to "commence and come into operation," though later than that on which it received the royal assent. The word "hereafter," in the second sub-section, means after the commencement of the Act; which speaks, generally, from the time of its commencement. If the legislature had meant to take away rights previously acquired, such an intention, (being opposed to the spirit and principle of the presumption, expressed in the maxim to which I have referred, and recognised by Sir Edward Coke and other great authorities,) might have been expected to be made unequivocally clear; which, to my mind at least, it certainly is not. According to the ordinary presumption, the words "a writ of elegit," as here used, would mean a writ first issued, or at all events first made effective, after (and not before) the commencement of the Act.

The latter part of the sub-section, "nor shall a writ of elegit extend to goods," cannot, in my opinion, without much violence to the natural meaning of the words, receive any other construction. The writ which was issued in the present case, in the usual and prescribed form, under and according to the provisions of the Statute of Westminster, (then still unrepealed and unaltered,) beyond all question did extend to goods, in fact and in law. If the legislature had intended, as from the 31st of December, 1883, to alter the construction, as well as to intercept the further execution, of such a writ already issued and then in the sheriff's hands, it would surely have found a more appropriate way of expressing that intention, than by saying, "*a writ* of elegit

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shall not extend to goods." It has been suggested, that these words not only may include, but may mean solely and *exclusively* "a writ of elegit *issued before the commencement of the Act.*" Such a construction, as it seems to me, would interpolate a limitation, which, if meant, might very easily have been expressed. I cannot myself doubt that these words do refer to writs of elegit to be *afterwards* issued: and, if so, I think it is a strong reason for construing the same words, "a writ of elegit," where they first occur in the immediate context of the same sentence, as having the same meaning.

Before I notice the argument mainly relied upon in support of the contrary view, I must advert to one founded upon the 2nd sub-section: "No writ of levari facias shall hereafter be issued in any civil proceeding." It was inferred from this that the legislature, when it used the different language of the 1st sub-section, had not in view writs to be "hereafter issued." To this argument it is, in my judgment, a sufficient answer, that, by the 2nd sub-section it was meant to prohibit altogether the issue, after the commencement of the Act, in any civil proceeding, of any writ of levari facias. By the 1st sub-section it was *not* contemplated or intended that writs of elegit should cease to be issued, but only that their form and effect should be altered. The difference in the language of the two sub-sections, (assuming both of them to leave untouched the operation of writs actually issued and effective before the commencement of the Act,) is merely such, as this difference required, or at least made natural and appropriate.

The main argument was, that any other construction than that adopted by the Court below would make either the former or the latter part of the 1st sub-section inofficious and superfluous; and would be contrary to the rule, that effect must be given to all the words.

After full consideration of this argument, I am unable to agree with it. I see no difficulty here in giving effect to all the words, consistently with the appellant's construction, or in placing upon each branch of the sub-section a distinct sense; and, although it may be true that what is said, either in the first or in the second branch, might have been inferred (in point of law) from what is

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said in the other, I cannot admit that there is any such presumption against fullness or even superfluity of expression, in statutes or other written instruments, as to amount to a rule of interpretation controlling what might otherwise be their proper construction. No doubt, when the words admit of it, that interpretation which makes them more officious with respect to the clear and ascertained policy of the statute, or purpose of the instrument, is (in general) to be preferred to that which makes them less so. But for the reasons which I have already given (and others which I shall hereafter add), I find nothing here from which I can infer that it *was* the policy of this enactment to destroy and nullify rights acquired, and already in process of realization, before its commencement. And I adhere to an opinion, expressed by myself in the House of Lords more than ten years ago in *Giles* v. *Melsom* (1), which, unless I am much deceived, I have also heard in substance expressed by great masters of the law, that "nothing can be more mischievous, than the attempt to wrest words from their proper and legal meaning, only because they are superfluous."

According to my view of the proper and legal meaning of the 2nd sub-section of clause 146 of the Bankruptcy Act of 1883, the first part of the sentence, "The sheriff shall not under a writ of elegit deliver the goods of a debtor," takes away for the future the remedy against goods by way of elegit given to judgment creditors by the Statute of Westminster; and the subsequent words, constituting the second part of the sentence, require the form of the writ to be altered, for the future, in accordance with that change in the law. I cannot accede to the view that, because express words so dealing with the form of the writ may have been inserted ex abundanti cautelâ, and may not have been really necessary, the construction which either those or the preceding words would have received, if they had stood alone, ought to be altered.

It is important to bear in mind that *delivery* by the sheriff is the *whole and sole right* given to the elegit creditor by the Statute of Westminster; all other things which the sheriff has to do under the writ commanding him to make such delivery, (entry,

(1) Law Rep. 6 H. L. 33, 34.

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seizure, and appraisement,) being merely preliminary acts, not expressed in the statute or in the writ, but implied from the nature of the duty to be performed. The words of the statute (to which the 146th section of the new Bankruptcy Act plainly refers) are: "When debt is recovered or knowledged in the King's Court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages . . . *that the sheriff shall deliver to him* all the chattels of the debtor, saving only his oxen and beasts of the plough, and the one half of his land, until the debt be levied upon a reasonable price or extent." The Bankruptcy Act, by the words "the sheriff shall not under a writ of elegit deliver the goods of a debtor," takes away, as to goods, *this whole remedy;* and a construction depriving the creditor of his title to delivery, in a case in which the goods were in the hands of the sheriff under an elegit duly issued before the 31st of December, 1883, would destroy his whole vested right under the Statute of Westminster, and would, for every practical and substantial purpose, give the enactment, as against him, a retrospective operation. This is not at all like the operation of the 145th section; which (assuming it to apply to pending executions) only regulates, in a just and reasonable manner, the exercise of the right, and does not take the right away.

I pass from the 146th to the 169th section of the Act, which appears to me to shew positively that the legislature did *not* intend to take away, under the circumstances of this case, the creditor's right. That section expressly repeals various enactments, to the extent mentioned in the schedule, one of which is "the Statute of Westminster the Second, c. 18, in part; namely, the words '*all the chattels of the debtor, saving only his oxen and beasts of the plough and.*'" Those who think it improbable that the legislature could have devoted more clauses, or more words, than were necessary to the accomplishment of substantially the same object, meet here with an express repeal of those words in the Statute of Westminster, which, on any possible construction of the 146th section (except that which would make it throughout and exclusively retrospective), had been altogether deprived of their whole force and effect by the

146th section. If the principle "ex abundanti cautelâ" is sufficient (as I think it is) reasonably to explain this, much more is it sufficient to explain the addition, in sub-s. (1) of s. 146, of the words dealing with the form of the writ of elegit to the previous words dealing with the substance of the remedy.

It is therefore, in my opinion, clear that the legislature has by this section thought it right to confirm and corroborate, by express repeal of the particular words relating to chattels in the Statute of Westminster, the substance of the enactment contained in the 146th section. But that repeal is accompanied by savings, which, if applied to the repealed portion of the Statute of Westminster, expressly preserve the creditor's right in the present case. The material savings are these: "The repeal effected by this Act shall not affect (*a*) anything done or suffered before the commencement of this Act under any enactment repealed by this Act; nor (*b*) any right or privilege acquired, or duty imposed, or liability or disqualification incurred, under any enactment so repealed." It is to be observed that these savings apply, in terms, to the repeal effected "by this Act," not specifying that particular section only. Upon that distinction, however, I do not lay stress; because, being satisfied that the repealing clause and the 146th section ought to be read together, and that the repeal adds nothing substantially to the effect of that section, I am unable to give the saving any narrower construction than it would have had if the repeal, with the saving, (so far as relates to the Statute of Westminster,) had been added immediately after the words, "The sheriff shall not under a writ of elegit deliver the goods of a debtor, nor shall a writ of elegit extend to goods," in the 146th section itself.

It was argued, that savings from a repealing clause would not apply to any express antecedent provision of the Act inconsistent with them; and to this I agree. But the fallacy of that argument, (as it seems to me,) is this, that it assumes an inconsistency which I do not find to exist. There are no words in s. 146 which expressly say, or from which it can (to my mind) reasonably be inferred, that any such rights as are saved by s. 169 were intended to be taken away in the particular case of creditors who had

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obtained writs of elegit before the 1st of January, 1884. On the contrary, the general principle, expressed in the maxim "omnis nova constitutio," &c., to which I have already referred, militates against the supposition that the words of s. 146, even if they stood alone, ought to have been so construed. I find, then, in s. 169, an express enactment that the repeal of the words as to the delivery of chattels in the Statute of Westminster shall not affect any right acquired, or duty imposed, under them. The execution creditor had, under those words of that statute, while unrepealed, acquired a right to the delivery of the goods seized; and a duty was imposed by the same words upon the sheriff to deliver them to him. That right, and that duty, are in my opinion expressly preserved; and under these circumstances, much as I regret to find myself differing from judges for whose opinions I have the very highest respect, I cannot hesitate to say that I think the order appealed from erroneous, and that it ought to be reversed.

BRETT, M.R. When this case was first argued before my Brother Bowen and myself we thought it one of general interest and of great difficulty, and we therefore desired that it should be argued before the full Court of Appeal. The more, however, I have considered this case the more difficult it appears to me to be, but I have come to the conclusion, though with great doubt, that the legislature intended in this Act of Parliament to be verbose and tautologous, and intended to express itself twice over. Having come to that conclusion the interpretation which has been arrived at follows, but I desire emphatically to say that I can be no party to doing away with an acknowledged rule of construction except in extreme cases. I think that this is an extreme case, and I cannot disagree with the judgment which the other members of this Court have arrived at.

BOWEN, L.J. The question to be decided in the present case is whether the provisions as to writs of elegit of the Bankruptcy Act, 1883, affect a writ which had been issued and under which the sheriff had seized before the coming into operation of the Act on the 1st of January, 1884.

Writs of elegit had their origin in the year A.D. 1285, under the Statutes of Westminster the Second, c. 18, by which it was provided that when "debt is recovered or knowledged in the King's Court or damages awarded it shall be from henceforth in the election of him that sueth for such debt or damages to have a writ of fi. fa. to the sheriff for to levy the debt of the land and goods, or that the sheriff shall deliver to him all the chattels of the debtor saving only his oxen and beasts of the plough and the one-half of his land until the debt be levied upon a reasonable price or extent."

At common law the writ of elegit, like other writs of execution, would probably bind the debtor's goods from the date of its issue: but by the Statute of Frauds it was provided that no writ of execution should bind the property of the goods but from the time of its delivery to the sheriff. Upon receiving a writ of elegit the sheriff was not in terms commanded by the Statute of Westminster to seize any goods at all, but only to deliver the debtor's goods to the creditor to satisfy the debt. But a direction to deliver implies an authority to seize, and in practice the sheriff's officer begins with a seizure which is followed by inquisition and perfected by the statutory delivery, for under the Statute of Westminster the Second there is no sale of the debtor's goods upon an elegit, as there is upon a fieri facias, but a delivery only. And it was held in the Court of Appeal in *Ex parte Abbott* (1) both that a sheriff under a writ of elegit is entitled to seize the debtor's goods at once before the holding of the inquisition, and also that from the time of such seizure the creditor becomes a secured creditor within the meaning of s. 16, sub-s. 5, of the Bankruptcy Act, 1869. And it was further decided that a seizure of goods under an elegit did not fall within the operation of s. 87 of the Bankruptcy Act, 1869. The result of this decision was still to leave in writs of elegit a means of evading s. 87 of that Act. The costs of the proceedings under an elegit were also considerable, while there being no sale but only a valuation by a jury of the debtor's goods the justice which was done under the form of writ was more or less rough. Accordingly, in 1880, the late Lord

(1) 15 Ch. D. 447.

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Justice James declared the proceeding against goods and chattels by way of elegit to be an absurd anachronism, and expressed a hope that it would be forthwith abolished by the legislature.

The Bankruptcy Act of 1883 puts an end for the future to the operation of writs of elegit so far as goods and chattels are concerned, leaving them still in force as regards the debtor's lands, and the question raised in the present case is how far the language in which this salutary alteration of the law has been expressed affects the case of writs under which on the 1st of January, 1884, there had been a seizure but no delivery. The sections of the Bankruptcy Act, 1883, which apply to it are ss. 146 and 169, the latter of which repeals the Statutes of Westminster the Second, c. 18, so far as relates to goods, the former of which (s. 146) legislates expressly as to what is to be done in respect of goods and chattels under writs of elegit, and is as follows :—

(S. 146.) "(1.) The sheriff shall not under a writ of elegit deliver the goods of a debtor, nor shall a writ of elegit extend to goods.

"(2.) No writ of levari facias shall hereafter be issued in any civil proceeding."

The first observation to be made upon this section is that the writ of elegit is not abolished altogether like the writ of levari facias; but is only restricted in future to lands as distinct from goods and chattels of the debtor.

It is to be remarked in the second place that the words of the section as regards writs of elegit are couched in the very widest form, and in their ordinary signification would comprehend the case not merely of writs issued after the 1st of January, 1884, but also of writs issued before that date, whether seizure had or had not been effected by the sheriff. In spite of this generality of expression, we should be still bound to search for such a construction to be put upon them as would neither prejudicially affect vested rights nor render abortive the legal effect of things already done; and even if the words stood alone it would be more in conformity with known canons of interpretation to assume that they were not meant to apply to cases where the sheriff had already

seized before the Act came into operation. "Nova constitutio futuris formam imponere debet, non præteritis." It is true that the hardship of applying their operation to cases where there had been a seizure before the 1st of January is considerably diminished by the fact that some months are allowed to elapse between the passing of the Bankruptcy Act, 1883, and its coming into operation; an interval sufficiently long to enable writs in force at the time the Act was passed to work themselves out by delivery. But nevertheless a writ of elegit upon seizure under it by the sheriff has begun at once to operate and a vested right has been thereby acquired, unless it was the intention of the legislature to destroy it: see *Williams* v. *Smith*. (1) The difficulty, however, in the present instance of placing a restricted construction upon s. 146 of the Bankruptcy Act, 1883, so as to respect the rights of a creditor who had already seized between the date of the passing of that Act and of its coming into operation, arises principally from the fact that the subject of writs of elegit is again specifically dealt with in s. 169. This latter section repeals so much of the Statutes of Westminster the Second, c. 18, as relates to the debtor's chattels, saving however any right or privilege already acquired. It was forcibly argued before us that the effect of this latter section taken alone being of itself to prevent goods and chattels being taken in execution under any writ of elegit issued after the 1st of January, 1884, it followed as a matter of reasoning that the enactment contained in s. 146 would have nothing at all upon which to operate unless it was intended expressly to apply to cases where the execution had begun, but had not been perfected by delivery, before that date. And the counsel for the respondents urged upon us that it was our duty so to construe the Act as to give effect to the language of s. 146, and not to adopt an interpretation which would render s. 146 superfluous.

It appears to me that the answer to this somewhat formidable argument is to be found in a study of the framework of the Bankruptcy Act, 1883, so far as it works a repeal of previous legislation. It does not seem to me to be possible, without

(1) 4 H. & N. 563.

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misunderstanding the scheme of drafting which the legislature has adopted, to treat the repealing s. 169 as an independent section, or one intended to do more than for sake of symmetry to repeal expressly in a group those portions of previous statutes which had already been repealed by implication in the body of the Act. I have examined Schedule 5 in detail, which contains the list of previous Acts of Parliament, all or part of which is to be repealed by s. 169, and I have come to the conclusion that the idea upon which the Bankruptcy Act, 1883, has been framed was to enact in the first place specifically a complete code of provisions which, so far as they are inconsistent with any previous legislation, would repeal it by implication, and then over again, at the very last, to clear the statute book, so to speak, by s. 169, and to sweep into one compendious repeal section all the statutes, and sections of statutes, which in the earlier part of the Act had been impliedly done away with already, the Bankruptcy Act, 1869, being itself among the number. The mere fact therefore that an express repeal of certain provisions as to elegit is contained in this general clause would not be any longer an argument for putting on the earlier sections of the Bankruptcy Act, 1883, any construction which they would not independently demand. It seems to me, so far as I have been able to judge, that this observation applies equally to all the Acts and parts of Acts mentioned in Schedule 5. The sweeping repeal of each in express terms has already in all cases been preceded in the body of the Bankruptcy Act, 1883, by special enactments as to the individual subject-matter which would work an implied repeal to the same extent as that afterwards expressly enacted. And I think that the words with which the saving clause in s. 169 begin, viz., "The repeal effected by this Act shall not affect any right, &c., acquired under any enactment so repealed," are large enough, whether so designed by the draftsman or not, to save vested rights both against the operation of s. 169, the general repeal clause itself, and also against that of the previous clauses of the Act. Had then any right been here acquired by the creditor before the 1st of January, 1884? It seems to me that the writ of elegit, but for the repealing sections of the Bankruptcy Act, would, to use the language of the Court

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in *Williams* v. *Smith* (1), have then been in operation; and I also think, even without the saving clause of s. 169, for the reason I have already mentioned, s. 146, unless it is to receive some special force from the co-existence of another clause, s. 169, dealing with the same subject (which, as I have shewn, ought not to be the case) may itself receive a reasonable construction which would except from its operation writs under which prior to the 1st of January the sheriff had already seized. The Statutes of Westminster the Second only direct that the sheriff shall deliver the goods to the creditor. By implication of law it has no doubt been held that it is the sheriff's duty previously to seize, and that not only does the writ of elegit bind the debtor's goods by delivery to the sheriff, but also that upon seizure the creditor becomes a secured creditor and free from the operation of s. 87 of the Bankruptcy Act, 1869. Sect. 146 of the new Bankruptcy Act (not wishing to abolish the writ of elegit altogether) first of all, not unnaturally, puts an end to the "delivery" under it of goods and chattels which the Statute of Westminster required. It next proceeds to deal with the form of the writ itself. And perhaps to prevent any question whether the writ of elegit whose operation was thus mutilated still was to have any effect whatsoever on the property in the goods and chattels, and possibly to prevent any suggestion that the creditor by means of the sheriff might seize and hold possession of, though he could no longer demand a delivery of, the goods to himself in satisfaction, added the further provision that the writ of elegit should not extend to chattels at all. This would account for the mode in which s. 146 is passed. Both the recognised rule that statutes should be interpreted if possible so as to respect vested rights, and it may be the effect of the saving clause in s. 169 itself would be to withdraw from the operation of s. 146 all writs which, like the present, were already in force and vigour prior to the 1st of January, 1884. For these reasons, though I do not think the matter perfectly free from doubt, I have arrived at a distinct conclusion that the judgment of the Court below should be reversed.

(1) 4 H. & N. 562.

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Bowen, L.J.

Lord Justice Cotton desires me to say that he agrees with the rest of the Court that the judgment appealed from must be reversed, but that he should have been unable to arrive at this conclusion if the question had turned simply on the true construction of ss. 146 and 169 alone. In that case, as s. 169 by repealing a portion of the Statute of Westminster prevents any writ of elegit issued after the Act came into operation from affecting or extending to chattels, and no writ so issued would authorize the sheriff to deliver the goods of a debtor, he would have been unable to concur in a construction of s. 146 which confines its effect to writs issued after the Bankruptcy Act came into operation. But in other instances, where portions of Acts of Parliament are repealed by the 169th section, he finds that there are in previous sections of the Act enactments which in effect repeal the portions of statutes in terms repealed by s. 169, and he therefore comes to the conclusion that the frame of the Bankruptcy Act, 1883, is first to enact provisions which in effect, though not in terms, repeal those of earlier statutes, and then, either ex abundanti cautelâ, or to clear the statute-book, to repeal in terms the portions of Acts which have been in effect though not in terms already repealed.

Judgment reversed.

Solicitors for plaintiff: *Lyne & Holman.*
Solicitors for defendant: *Ingledew, Ince, & Colt.*
Solicitor for sheriff of Middlesex: *W. Maynard.*

W. P.

[IN THE COURT OF APPEAL.]

1884
Feb. 14.

THE OVERSEERS OF THE TOWNSHIP OF MIDDLESBROUGH, APPELLANTS; THE JUSTICES OF THE NORTH RIDING OF YORKSHIRE, RESPONDENTS.

County Rates—Borough Liability of County Rate—Main Roads—Middlesbrough Extension and Improvement Act, 1874 (38 *Vict. c. cviii.*)—*Highways and Locomotive Amendment Act*, 1878 (41 *& 42 Vict. c.* 77), *s.* 13.

By a local Act passed in 1874 the limits of the borough of Middlesbrough were extended. By s. 20 of that Act it was enacted that the extended area "shall be exempt from all county rates save only in respect of the purposes for which any county rates are now leviable within the existing borough." At the time of the passing of that Act general county rates were leviable within the existing borough for all purposes for which general county rates could be levied in any part of the riding. By s. 13 of the Highways and Locomotive Amendment Act, 1878, any road which has ceased to be a turnpike road in manner described by the Act shall be deemed to be a main road, and one-half of the expense incurred by the highway authority in the maintenance of such road shall be contributed out of the county rate:—

Held, that as within the borough existing at the time of the passing of the local Act general county rates were leviable for all purposes, the saving of such liability rendered the exemption in s. 20 inoperative; and therefore the inhabitants of the extended area of the borough were not exempt from liability to pay county rates for the maintenance of a road under s. 13 of the Highways and Locomotive Amendment Act, 1878.

The decision of the Queen's Bench Division affirmed.

APPEAL by the overseers of the poor of the township of Middlesbrough from a decision of the Queen's Bench Division (1) on a special case stated by the justices at quarter sessions of the North Riding of the county of York.

The facts are stated in the report of the judgment of the Queen's Bench Division, and may for the present purpose be sufficiently collected from the above headnote.

Forbes, Q.C., and *R. Luck*, for the appellants.

A. Charles, Q.C., and *W. Meek*, for the respondents, were not called upon.

LORD COLERIDGE, C.J. The Middlesbrough Extension Act,

(1) 11 Q. B. D. 490.

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OVERSEERS OF MIDDLESBROUGH v. JUSTICES OF NORTH RIDING.

1874, has a common form of section, namely s. 20, which in certain cases may have a reasonable application, but in this particular case it has not, since the saving clause in the latter part of it makes the exemption from county rates in the former part of it useless. The latter part of the section says "save only in respect of the purposes for which any county rates are now leviable within the existing borough," and it is admitted that within the existing borough general county rates were then leviable for all purposes, so that the saving clause is as large as the exemption, and makes therefore the exemption from county rates useless and inoperative. The only suggestion which could be made on the part of the appellants was that by Mr. Forbes, namely, that the exemption was intended to apply to future imposed county rates, but I think such a construction would be unreasonable, as it would be an indirect way of attempting to govern the construction of all future enactments. This appeal, therefore, must be dismissed.

BRETT, M.R., and BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors for appellants: *Helder, Roberts, & Gillett, for H. Watson, Middlesbrough.*

Solicitors for respondents: *R. M. & F. Lowe, for W. C. Trevor, Guisborough.*

W. P.

THE QUEEN ON THE PROSECUTION OF JOHN LAVER *v.* MANNING AND ANOTHER. 1883 *Dec.* 17.

Criminal Law—Conspiracy—Indictment against Two for conspiring together—Acquittal or Conviction of both.

Where two persons are indicted for conspiring together and they are tried together, both must be acquitted or both convicted.

THIS was a rule obtained on behalf of the defendant Manning, calling on the prosecutor to shew cause why the verdict for the Crown should not be set aside and a new trial had.

An indictment was preferred against the defendants Manning and Hannam for conspiring together to cheat and defraud the prosecutor. The case was removed by certiorari and tried on the civil side at the last summer assizes at Winchester, before Lord Coleridge, C.J. and a special jury. The jury were directed that on this indictment they might find one prisoner guilty and acquit the other. They returned a verdict of guilty against Manning, but were unable to agree as to Hannam and were discharged from giving a verdict. Manning was put under recognizance to surrender to receive judgment in the Queen's Bench Division, and the trial of Hannam was postponed. This rule was obtained on the ground of misdirection.

C. W. Mathews, and *B. Coleridge*, shewed cause. The application is premature. This is not the case of an acquittal, for there is no verdict against Hannam, who for anything that is known may be convicted when he is next put on his trial, and in that case the verdict against Manning could not be impeached. Secondly, the direction was right. The question was, guilty or not guilty on the evidence, that is the evidence against that particular person. For instance, there may be a confession or statement by one prisoner on which he ought to be convicted but which is not evidence against the other, who may, in the absence of evidence, be entitled to be acquitted. The principle is recognised in the practice of the Divorce Court: *Robinson* v. *Robinson and Lane*. (1) If two persons are indicted for a

(1) 1 Sw. & Tr. 362.

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conspiracy, and only one of them appears and takes his trial he may be found guilty though the other defendant is absent and has not pleaded: *Rex* v. *Kinnersley* (1); *Rex* v. *Nichols* (2); *Reg.* v. *Ahearne.* (3) In *Rex* v. *Cooke* (4) Littledale, J., said, "If the other defendant shall hereafter be acquitted, perhaps this judgment may be reversed;" but to this there is a note in Russell on Crimes, vol. iii., 4th ed., p. 146: "Sed quære, for such acquittal would not necessarily shew that the verdict of guilty on the former trial was wrong, as witnesses might be dead or absent who were examined on the former trial, or the one defendant might have been convicted on his own confession, which would not be admissible against the other." The opinion of Erle, J., in *Reg.* v. *Thompson* (5) supports the present contention.

A. Charles, Q.C., and *Warry*, in support of the rule. If there has been a misdirection the defendant is entitled to a new trial, and he can only obtain that by moving now, consequently the application is not premature. In a charge against two persons of conspiring together the jury must be satisfied as to each of them that both conspired. The facts establishing this in each case may differ, and there may be different overt acts proved against each, but there must be evidence of the common design. The case of a riot is analogous: *R.* v. *Sudbury.* (6) No doubt a man can be indicted alone for a conspiracy, for he may conspire with a person unknown, but the jury must be satisfied that the person unknown conspired with the prisoner before they can convict. In *Rex* v. *Cooke* (7) there was no repugnancy on the record, whereas in this case the direction to the jury might lead to repugnant verdicts against the two. In 3 Chitty's Criminal Law, 1141, it is laid down that if all the defendants mentioned in an indictment for conspiracy except one are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can be passed on him. The charge here is simply of conspiracy between the two defendants, and consequently one cannot be

(1) 1 Str. 193.
(2) 13 East, 412, n.
(3) 6 Cox, C. C. 6.
(4) 5 B. & C. 538.
(5) 16 Q. B. 832.
(6) 12 Mod. Rep. Case 473.
(7) 5 B. & C. 538.

convicted without the other. *Reg.* v. *Thompson* (1) is a direct authority, and even the dissent of Erle, J., rested only on a pleading ground, and did not conflict in principle with the judgment of the majority. In *O'Connell* v. *The Queen* (2) it was decided that where a count in an indictment charged eight defendants with one conspiracy to effect certain objects, a finding that three of the defendants were guilty generally, and that five of them were guilty of conspiracy to effect some and not guilty as to the residue of these objects, was bad and repugnant, and the same principle underlies the two cases.

MATHEW, J. In this case I have come, after considerable doubt, and I confess with great reluctance, to the conclusion that there must be a new trial. The man who was convicted had a perfectly fair trial, and a summing-up distinctly in his favour, and every precaution was taken which could be taken to prevent any evidence being acted on by the jury which could not be legitimate evidence against him. Nevertheless I am satisfied by the argument of Mr. Charles that there is an imperative rule of law which should have prevented my Lord from informing the jury, as he did, that it was possible in such a case to convict one of the men and to acquit the other. The rule appears to be this. In a charge for conspiracy in a case like this where there are two defendants, the issue raised is whether or not both the men are guilty, and if the jury are not satisfied as to the guilt of either, then both must be acquitted. In *Rex* v. *Cooke* (3) the Court could not have pronounced the judgment they did unless they had assumed the existence of the rule. So in *Reg.* v. *Thompson* (1) it appears that the Court were of opinion that this rule existed. The authority does not rest there. There is, in addition, a passage in the judgment in *Robinson* v. *Robinson & Lane* (4), in which the rule of law is treated as perfectly clear. (5) Lastly, there is the judgment of the House of Lords in *O'Connell* v. *The Queen* (2), which seems to me to be another clear illustration of the rule. It appears to me therefore that the direction

(1) 16 Q. B. 832.
(2) 11 Cl. & F. 155.
(3) 5 B. & C. 538.
(4) 1 Sw. & Tr. 362.
(5) 1 Sw. & Tr. at p. 392.

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given here was one which should not have been given to the jury, and that there must be a new trial.

STEPHEN, J. I have arrived at the same conclusion with great reluctance, and entirely upon the authority of the passage in *O'Connell* v. *The Queen*. (1) The decision is of the highest authority, and clearly shews that it is a legal impossibility that when several persons are indicted for a conspiracy any verdict should be found which implies that some were guilty of one conspiracy and some of another. With regard to the other two cases which bear upon the matter, namely, *Rex* v. *Cooke* (2), and *Reg.* v. *Thompson* (3), I should have had no difficulty in saying that I thought they left open the matter which *O'Connell* v. *The Queen* (1) appears to have decided. In *Robinson* v. *Robinson and Lane* (4) I think the part of the judgment relating to the criminal law is a mere dictum. The rule applicable to divorce cases is, as it appears to me, founded on common sense, and general principles would be in favour of the contention which is raised on the present occasion by the prosecution. I cannot, however, see any distinction between the rule that should apply to the present case and that cited from *O'Connell* v. *The Queen* (1), and that being so I think the direction cannot be supported.

LORD COLERIDGE, C.J. I have some time ago come to the conclusion that I misdirected the jury. At the trial I had not the cases of *Rex* v. *Cooke* (2) or *Reg.* v. *Thompson* (3) before me, which I confess seem to me much in point. But what influenced me at the time was that it seemed difficult to distinguish in principle between the rules that should govern such a case as the present and the practice which had obtained in the Divorce Court in *Robinson* v. *Robinson and Lane* (4) and *Stone* v. *Stone and Appleton* (5), and other cases of that description, and which is based on the fact that that which is evidence against one person is by no means necessarily by our law evidence against another. It follows that where there is a joint offence which has to be proved against each person separately, the evidence which

(1) 11 Cl. & F. 155, pp. 236–237.
(2) 5 B. & C. 538.
(3) 16 Q. B. 832.
(4) 1 Sw. & Tr. 362.
(5) 3 Sw. & Tr. 608.

is sufficient to convict one person of the offence may not by any means be sufficient to convict the other. The principles of the practice of the Divorce Court in this matter seem to me to be sound, and they ought to be applied to analogous cases. I am by no means prepared to say that if the matter were res integra, and even in this case if there could have been an appeal from this decision to some other tribunal, I might not have adhered to my view, and left the point to be settled by higher authority. But I feel bound by what I now understand to be the established rule of practice. The earlier cases, it is true, are stated shortly and without much particularity of detail. It may be, if we had all the facts of those cases, they might turn out to be less in point than they appear to be at present, but still from the time of the 14 Hen. 4 (1), it has been taken for granted by the judges of these Courts, that in cases of an indictment for conspiracy, when two people are indicted and are tried together (because different considerations arise where people are not tried together), either both must be convicted or both must be acquitted. That seems to me to have been determined, or, if not determined, taken for granted from very early times.

Coming down to later times, the same thing must have been in the minds of the judges who decided the cases of *Rex* v. *Cooke* (2) and *Reg.* v. *Thompson.* (3) There are distinctions, I quite agree, which prevent either of those cases being directly in point; but in 1826 the Court of King's Bench, though it did not decide, certainly seems to have assumed, as the principle underlying this whole matter, the rule which has been contended for on behalf of the defendant. In *Reg.* v. *Thompson* (3), although Erle, J., differed on a particular point from the three other members of the Court, he differed on a pure point of pleading, and not from the principle which the other three judges assumed or laid down. Erle, J., does not say a word to the contrary of that principle; in fact, he rather assumed it, because he tried to support the conviction upon a ground on

(1) *Thody's Case,* 14 Hen. 6, 25 b., and in note to *Rex* v. *Cooke,* 5 B. & C. 541.

(2) 5 B. & C. 538.

(3) 16 Q. B. 832.

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which, technically as a matter of pleading, I should think he was wrong, namely, that "persons unknown" could be construed to mean the two persons who, in the particular circumstances of that case, the jury were unable to agree about. Then there is the case of *O'Connell* v. *The Queen* (1), which assumes this point as the rule of practice, and upon that, although there was a difference of opinion upon other points, the judges agreed. The principle which underlies that decision is that where there are one or more persons charged with conspiracy, the count is a single and complete count and cannot be separated into parts. The principle is the same here. I certainly directed the jury contrary to that principle: therefore I misdirected the jury, and the rule must be absolute for a new trial. I think it right to mention that I have not forgotten in sitting in this Court the Rule as to hearing applications for a new trial (2), but in those Rules there is an exception of criminal proceedings, and as this is a criminal proceeding, I have thought it right to take part in this judgment.

Rule absolute for a new trial.

Solicitors for prosecution: *Sole, Turner, & Knight, for H. R. Hooper, Newport, I.W.*

Solicitors for defendant: *John Turner & Son, for F. P. Henry, Newport, I.W.*

(1) 11 Cl. & F. 155.

(2) Ord. XXXIX. r. 2.

A. M.

THE QUEEN *v.* PRICE.

1884
Feb. 7.

Criminal Law — Burning Dead Body — Misdemeanor — Nuisance — Inquest — Preventing Inquest being held.

To burn a dead body, instead of burying it, is not a misdemeanor, unless it is so done as to amount to a public nuisance.

If an inquest ought to be held upon a dead body, it is a misdemeanor so to dispose of the body so as to prevent the coroner from holding the inquest.

At the assizes held at Cardiff before Stephen, J., in February, 1884, William Price was indicted for attempting to burn the body of his child, instead of burying it; and a second indictment charged him with attempting to burn the body with intent to prevent the holding of an inquest upon it.

G. B. Hughes, Q.C., and *B. T. Williams*, appeared for the prosecution.

The prisoner was undefended.

After hearing counsel for the prosecution, the learned judge left the case to the jury, directing them in the terms of his charge to the grand jury, which on account of the importance and novelty of the subject to which it relates is here given. The jury acquitted the prisoner on both charges.

Stephen, J. One of the cases to be brought before you is so singular in its character, and involves a legal question of so much novelty and of such general interest, that I propose to state at some length what I believe to be the law upon the matter. I have given it all the consideration I could, and I am permitted to say that although I alone am responsible for what I am about to say to you Lord Justice Fry takes the same view of the subject as I do, and for the same reasons.

William Price is charged with a misdemeanor under the following circumstances:—He had in his house a child five months old of which he is said to have been the father. The child died and Price, as it seems, did not register its death. The coroner accordingly gave him notice on Saturday, the 12th of January, 1884, that unless he sent a medical certificate of the cause of the child's death he (the coroner) would hold an inquest

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on the body on the following Monday. Price on the Monday afternoon took the body of the child to a field of his own, some distance from the town of Llantrissant, put it into a ten gallon cask of petroleum and set the petroleum on fire. A crowd collected, the body of the child which was burning was covered with earth, and the flames were extinguished, and Price was brought before the magistrates and committed for trial. He will be indicted before you on a charge which in different forms imputes to him as criminal two parts of what he is said to have done. Namely, first, his having prevented the holding of an inquest on the body; and secondly, his having attempted to burn the child's body.

With respect to the prevention of the inquest the law is, that it is a misdemeanor to prevent the holding of an inquest which ought to be held by disposing of the body. It is essential to this offence that the inquest which it is proposed to hold is one which ought to be held. The coroner has not an absolute right to hold inquests in every case in which he chooses to do so. It would be intolerable if he had power to intrude without adequate cause upon the privacy of a family in distress and to interfere with their arrangements for a funeral. Nothing can justify such interference except a reasonable suspicion that there may have been something peculiar in the death, that it may have been due to other causes than common illness. In such cases the coroner not only may, but ought, to hold an inquest, and to prevent him from doing so by disposing of the body in any way—for an inquest must be held on the view of the body—is a misdemeanor. The depositions in the present case do not very clearly shew why the coroner considered an inquest necessary. If you think that the conduct of Price was such as to give the coroner fair grounds for holding one, you ought to find a true bill, for beyond all question Price did as much as in him lay to dispose of the body in such a manner as to make an inquest impossible.

The other fact charged as criminal is the attempt made by Price to burn the child's body, and this raises, in a form which makes it my duty to direct you upon it, a question which has been several times discussed, and has attracted some public attention, though so far as I know no legal decision upon it has ever

been given, the question, namely, whether it is a misdemeanor at common law to burn a dead body instead of burying it.

As there is no direct authority upon this question I have found it necessary to examine several branches of the law which bear upon it more or less remotely. The practice of burning dead bodies prevailed to a considerable extent under the Romans as it does to this day amongst the Hindoos, though it is said that the practice of burial is both older and more general. Burning appears to have been discontinued in this country and in other parts of Europe when Christianity was fully established, as the destruction of the body by fire was considered, for reasons to which I need not refer here, to be opposed to Christian sentiment, but this change took place so long ago, and the substitution of burial for burning was so complete, that the burning of the dead has never been formally forbidden or even mentioned or referred to, so far as I know, in any part of our law. The subject of burial was formerly, and for many centuries exclusively, a branch of the ecclesiastical or canon law. Amongst the English writers on this subject little is to be found relating to burial. The subject was much more elaborately and systematically studied in Roman Catholic countries than in England, because the law itself prevailed much more extensively. In the Jus Ecclesiasticum of Van Espen, II. 142–168, Part II. sect. iv. tit. vii. there is an elaborate discourse, filling twenty-two folio pages in double columns, on the subject of burial, in which every branch of the subject is systematically arranged and discussed, with references to numerous authorities. The importance of it is that it shews the view taken by the Canonists, and this view had great influence on our own ecclesiastical lawyers, though only a small part of the canon law itself was ever introduced into this country.

Van Espen throughout regards the participation in funeral rites as a privilege to which, subject to certain conditions, all the members of the Church were entitled, and the deprivation of which was a kind of posthumous punishment analogous to the excommunication of the living. The great question with which he occupies himself is, In what cases ought burial to be denied? The general principle is, that those who are not worthy of Church privileges in life are also to be excluded from them

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after death. ("Sicuti enim nonnullos vivos a suâ communione, præsertim in sacris, jam pridem excludendos censuit, ita quoque eosdem suâ communione post mortem indignos credidit.") As for the manner in which the dead bodies of persons deprived of Christian burial were to be disposed of, Van Espen says only that though in some instances the civil power may have entirely forbidden burial, whereby bodies may remain unburied and exposed to the sight of all to be devoured by beasts or destroyed by the weather (he considers the dissection of criminals as a case of this sort), the Church has never made such a provision, and has never prohibited the covering of such corpses with the earth.

This way of looking at the subject seems to explain how the law came to be silent on exceptional ways of disposing of dead bodies. The question was, In what cases burial must be refused? As for the way of disposing of bodies to which it was refused, the matter escaped attention, being probably regarded as a matter which interested those only who were so unfortunate as to have charge of such bodies.

The famous judgment of Lord Stowell in the case of iron coffins (*Gilbert* v. *Buzzard* (1)), which constitutes an elaborate treatise on burial, proceeds upon the same principles. The law presumes that every one will wish that the bodies of those in whom he was interested in their lifetime should have Christian burial. The possibility of a man's entertaining and acting upon a different view is not considered.

These considerations explain the reason why the law is silent as to the practice of burning the dead. Before I come to consider its legality directly, it will be well to notice some analogous topics which throw light upon it. There is one practice which has an analogy to funereal burning, inasmuch as it constitutes an exceptional method of dealing with dead bodies. I refer to anatomy. Anatomy was practised in England at least as far back as the very beginning of the seventeenth century. It continued to be practised without, so far as I know, any interference on the part of the legislature down to the year 1832, in which was passed the Act for regulating schools of anatomy—2 & 3 Wm. 4, c. 75. This Act recites the importance of anatomy,

(1) 2 Hag. Con. Rep. 333.

and that "the legal supply of human bodies for such anatomical examination is insufficient fully to provide the means of such knowledge." It then makes provision for the supply of such bodies by enabling "any executor or other party having lawful possession of the body of any deceased person," to permit the body to be dissected, except in certain cases. The effect of this has been that the bodies of persons dying in various public institutions whose relations are unknown are so dissected. The Act establishes other regulations not material to the present question, and enacts that after examination the bodies shall be "decently interred." This Act appears to me to prove clearly that Parliament regarded anatomy as a legal practice, and further, that it considered that there was such a thing as "a legal supply of human bodies," though that supply was insufficient for the purpose. This is inconsistent with the opinion that it is an absolute duty on the part of persons in charge of dead bodies to bury them, and this conclusion is rather strengthened than otherwise by the provision in s. 13, that the "party removing" the body shall provide for its decent burial after examination. This seems to imply that apart from the Act the obligation to bury would not exist, and it is remarkable that the words are not, as in the earlier section, "executor or other party," but "party removing," referring no doubt to the master of the workhouse or other person in a similar position who hands the body over to the surgeons. Upon him the statute imposes the duty of decently interring the bodies with which he is allowed to deal. The executor's rights at common law, whatever they may be, are not altered.

I come now to a series of cases more closely connected with the present case. As is well known the great demand for bodies for anatomical purposes not only led in some cases to murders, the object of which was to sell the body of the murdered person, but also to robberies of churchyards by what were commonly called resurrection men. This practice prevailed for a considerable length of time, as appears from the case of *Rex* v. *Lynn* (1), decided in 1788—forty-four years before the Anatomy Act. In that case it was held to be a misdemeanor to disinter a body for

(1) 2 T. R. 738.

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the purpose of dissection, the Court saying that common decency required that the practice should be put a stop to, that the offence was cognizable in a criminal court as being "highly indecent and contra bonos mores, at the bare idea alone of which nature revolted." They also said that "it had been the regular practice of the Old Bailey in modern times to try charges of this nature." It is to be observed in reference to this case that the act done would have been a peculiarly indecent theft if it had not been for the technical reason that a dead body is not the subject of property. The case, however, has been carried a step farther in modern times. It was held in *Reg.* v. *Sharpe* (1) to be a misdemeanor to disinter a body at all without lawful authority, even when the motives of the offender were pious and laudable, the case being one in which a son disinterred his mother in order to bury her in his father's grave, but he got access to the grave and permission to open it by a false pretence.

The law to be collected from these authorities seems to me to be this:—The practice of anatomy is lawful and useful though it may involve an unusual means of disposing of dead bodies, and though it certainly shocks the feelings of many persons, but to open a grave and disinter a dead body without authority is a misdemeanor, even if it is done for a laudable purpose.

These cases, for the reasons I have given, have some analogy to the case of burying a dead body, but they are remote from it. They certainly do not warrant the proposition that to burn a dead body is in itself a misdemeanor.

Two other cases come rather nearer to the point. They are *Reg.* v. *Vann* (2) and *Reg.* v. *Stewart* (3). Each of these cases lays down in unqualified terms that it is the duty of certain specified persons to bury in particular cases. The case of *Reg.* v. *Stewart* (3) lays down the following principles: "Every person dying in this country, and not within certain exclusions laid down by the ecclesiastical law, has a right to Christian burial: and that implies the right to be carried from the place where his body lies to the parish cemetery." It adds, "The individual under whose roof a poor person dies is bound" (i.e. if no one

(1) 1 D. & B. 160. (2) 2 Den. 325.
(3) 12 A. & E. 773, 779.

else is so bound—as appears from the rest of the case) "to carry the body decently covered to the place of burial. He cannot keep him unburied, nor do anything which prevents Christian burial. He cannot, therefore, cast him out so as to expose the body to violation, or to offend the feelings or endanger the health of the living; for the same reason he cannot carry him uncovered to the grave." In the case of *Reg.* v. *Vann* (1) the Court held: "That a man is bound to give Christian burial to his deceased child if he has the means of doing so; but he is not liable to be indicted for a nuisance if he has not the means of providing burial for it."

These cases are the nearest approach which I have been able to find to an authority directly upon the present point. It may be said that if there is an absolute duty upon a man having the means to bury his child, and if it is a duty to give every corpse Christian burial, the duty must be violated by burning it. I do not think, however, that the cases really mean to lay down any such rule. The question of burning was not before the Court in either case. In *Reg.* v. *Stewart* (2) the question was whether the duty of burial lay upon the parish officers or on some other person. In *Reg.* v. *Vann* (1) the question was whether a man who had not the means to bury his child was bound to incur a debt in order to do so. In neither case can the Court have intended to express themselves with complete verbal accuracy, for in the case of *Reg.* v. *Stewart* (2) the Court speaks of the "rights" of a dead body, which is obviously a popular form of expression—a corpse not being capable of rights, and in both cases the expression "Christian burial" is used, which is obviously inapplicable to persons who are not Christians, Jews for instance, Mahommedans, or Hindoos. To this I may add that the attention of neither Court was called to the subject of anatomy already referred to. Skeletons and anatomical preparations could not be innocently obtained if the language of the cases referred to were construed as if it were intended to be severely and literally accurate.

There is only one other case to be mentioned. It is the case

(1) 2 Den. 325. (2) 12 A. & E. 773, 779.

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of *Williams* v. *Williams*, which was decided just two years ago by Kay, J., in the Chancery Division of the High Court, and is reported in the Law Reports. (1) In this case one H. Crookenden directed his friend, Eliza Williams, to burn his body, and directed his executors to pay her expenses. The executors buried the body. Miss Williams got leave from the Secretary of State to disinter it in order, as she said, to be buried elsewhere. Having obtained possession of it by this misrepresentation, she burnt it, and sued the executors for her expenses. The case leaves the question now before me undecided. "The purpose," says Kay, J., "confessedly was to have the body burnt, and thereupon arises a very considerable question whether that is or is not a lawful purpose according to the law of this country. That is a question I am not going to decide." He held that in that particular case the removal of the body and its burning were both illegal according to the decision of *Reg.* v. *Sharpe* (2) already referred to. "Giving the lady credit," he said "for the best of motives, there can be no kind of doubt that the act of removing the body by that licence and then burning it, was as distinct a fraud on that licence as anything could possibly be." This was enough for the purposes of the particular case, and the learned judge accordingly expressed no opinion on the question on which it now becomes my duty to direct you.

The question arises in the present case in a perfectly clear and simple form, unembarrassed by any such consideration as applied to the other cases to which I have referred. There is no question here of the illegality and dishonesty which marked the conduct of those who were described as resurrection men, nor of the artifices, not indeed criminal but certainly disingenuous, by which possession of the body was obtained in the cases of *R.* v. *Sharpe* (2) and *Williams* v. *Williams*. (1) Price had lawful possession of the child's body, and it was not only his right but his duty to dispose of it by burying or in any other manner not in itself illegal. Hence I must consider the question whether to burn a dead body instead of burying it is in itself an illegal act.

After full consideration, I am of opinion that a person who burns instead of burying a dead body does not commit a criminal

(1) 20 Ch. D. 659. (2) 1 D. & B. 160.

act, unless he does it in such a manner as to amount to a public nuisance at common law. My reason for this opinion is that upon the fullest examination of the authorities, I have, as the preceding review of them shews, been unable to discover any authority for the proposition that it is a misdemeanor to burn a dead body, and in the absence of such authority I feel that I have no right to declare it to be one.

There are some instances, no doubt, in which courts of justice have declared acts to be misdemeanors which had never previously been decided to be so, but I think it will be found that in every such case the act involved great public mischief or moral scandal. It is not my place to offer any opinion on the comparative merits of burning and burying corpses, but before I could hold that it must be a misdemeanor to burn a dead body, I must be satisfied not only that some people, or even that many people, object to the practice, but that it is, on plain, undeniable grounds, highly mischievous or grossly scandalous. Even then I should pause long before I held it to be a misdemeanor, for many acts involving the grossest indecency and grave public mischief—incest, for instance, and, where there is no conspiracy, seduction or adultery—are not misdemeanors, but I cannot take even the first step. Sir Thomas Browne finishes his famous essay on Urn Burial with a quotation from Lucan, which, in eight words, seems to sum up the matter: "Tabesne cadavera solvat an rogus haud refert." Whether decay or fire consumes corpses matters not. The difference between the two processes is only that one is quick, the other slow. Each is so horrible that every healthy imagination would turn away from its details; but one or the other is inevitable, and each may be concealed from observation by proper precautions. There are, no doubt, religious convictions and feelings connected with the subject which every one would wish to treat with respect and tenderness, and I suppose there is no doubt that as a matter of historical fact the disuse of burning bodies was due to the force of those sentiments. I do not think, however, that it can be said that every practice which startles and jars upon the religious sentiments of the majority of the population is for that reason a misdemeanor at common law. The statement of such a proposition, in plain words, is a sufficient

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refutation of it, but nothing short of this will support the conclusion that to burn a dead body must be a misdemeanor. As for the public interest in the matter, burning, on the one hand, effectually prevents the bodies of the dead from poisoning the living. On the other hand, it might no doubt destroy the evidence of crime. These, however, are matters for the legislature, and not for me. It may be that it would be well for Parliament to regulate or to forbid the burning of bodies, but the great leading rule of criminal law is that nothing is a crime unless it is plainly forbidden by law. This rule is no doubt subject to exceptions, but they are rare, narrow, and to be admitted with the greatest reluctance, and only upon the strongest reasons.

This brings me to the last observation I have to make. Though I think that to burn a dead body decently and inoffensively is not criminal, it is obvious that if it is done in such a manner as to be offensive to others it is a nuisance of an aggravated kind. A common nuisance is an act which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects. To burn a dead body in such a place and such a manner as to annoy persons passing along public roads or other places where they have a right to go is beyond all doubt a nuisance, as nothing more offensive both to sight and to smell can be imagined. The depositions in this case do not state very distinctly the nature and situation of the place where this act was done, but if you think upon inquiry that there is evidence of its having been done in such a situation and manner as to be offensive to any considerable number of persons, you should find a true bill.

[IN THE COURT OF APPEAL.]

1883
Nov. 14.

HENRY AND OTHERS, PETITIONERS; ARMITAGE, RESPONDENT.

Municipal Elections Act, 1875 (38 & 39 *Vict. c.* 40), *s.* 1, *sub-s.* 2—*Nomination Paper—Christian Name of Candidate—Abbreviation of "William."*

A nomination paper at the election of a town councillor pursuant to the Municipal Elections Act, 1875, sufficiently states the christian name "William," of the person nominated by the abbreviation "Wm."

APPEAL from an order of the Queen's Bench Division, dismissing a petition to declare void the election of a town councillor of the borough of Sunderland. At the election, held on the 1st of November, 1881, the respondent and William Moore Skinner were the only candidates. The nomination paper of Skinner stated his surname as "Skinner" and his other names as "Wm. Moore," and it was objected for the respondent, in the first place, that this did not comply with s. 1, sub-s. 2, of the Municipal Elections Act, 1875, which requires the nomination paper to "state the surname and other names of the person nominated." There was another objection, but this was to the description of the qualifying property of one of the burgesses who nominated Mr. Skinner as not satisfying the requirements in this respect of schedule 1, form 2, to that Act, but further notice of this and of so much of the judgments of the Court as relates to it is omitted in this report, as it has been rendered unnecessary by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 56), which has repealed the Municipal Elections Act, 1875, and has not required that there should be any description of the property in respect of which the burgesses subscribing the nomination paper are enrolled. It states, however, in part II. rule 5, of the third schedule that "the nomination paper must state the surname and other names of the candidate" which corresponds with the above provision in this respect in sub-s. 2 of s. 1 of the Municipal Elections Act, 1875, and therefore this report is given, but it is limited to this first objection.

The mayor allowed both objections, and there being no other candidate, declared the respondent duly elected.

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McClymont, and *R. Lamb Wallace*, for the appellants (the petitioners).

E. Clarke, Q.C., and *Atherley Jones*, for the respondent.

LORD COLERIDGE, C.J. I am far from saying that my mind is clear on the matter, but on the best consideration that I am able to give, I have come to the conclusion that the judgment of the Court below cannot be supported, though I adhere to the language I used in *Mather* v. *Brown* (1), as to the great importance in matters of this kind of keeping strictly to the letter of the Acts. With regard to the first objection I have come to the conclusion that it is a bad one, on the authority of *Reg.* v. *Bradley* (2), which I think is directly in point and I think that when there is a decision directly in point, on a matter about which it is immaterial which way it be decided, and which decision involves no overwhelming inconvenience to either party, it should always be adhered to. Now, as I understand the case of *Reg.* v. *Bradley* (2), the Judges of the Court of Queen's Bench decided that "Wm." was a sufficient statement in a voting paper of the christian name "William" of the person for whom the vote was given, to satisfy the words of s. 14 of the Municipal Corporation Act, 7 Wm. 4 & 1 Vict. c. 78, which says "voting paper containing the christian name and surname of the persons for whom he votes." I thought at first that *Reg.* v. *Bradley* (2) had decided that "Wm." was a misnomer, and that because it contained a description which would be commonly understood as "William," it came within the curing s. 142 of that Act, and therefore the voting paper in that case was good. That would assume that but for that curing s. 142, the voting paper with such an abbreviation of the christian name would have been held not good, and consequently if my first view of that case were correct it would be a decision in favour of the respondent, but after looking carefully at the judgments in *Reg.* v. *Bradley* (2) it is clear to my mind that the Court did not decide the case on the ground I first thought, but that the voting paper contained the christian name of the person for whom the vote was given, "Wm." being a sufficient statement of such christian name.

(1) 1 C. P. D. 596. (2) 3 E. & E. 634; 30 L. J. (Q.B.) 180.

That appears from the judgment of the Court delivered by Hannen, J., in *Reg.* v. *Plenty* (1) which shews that that was the view which the Court of Queen's Bench took of the case of *Reg.* v. *Bradley.* (2) I prefer in a case like the present to put my judgment on authority, rather than to reason the point out and to attempt to draw the line as to what would be a sufficient statement of a christian name within the statute. I am aware that questions may be raised as to whether the abbreviation of other names will come within the same principle. It seems to me to have been decided that mere initials will not do, but that "Wm." will do for "William." That disposes of the first objection.

[His Lordship then proceeded to consider the second objection, and gave his reasons why that objection should also fail.]

BRETT, M.R. I am of the same opinion, but as to the first objection my opinion is stronger than that of the Lord Chief Justice. I think that the case of *Reg.* v. *Bradley* (2) did decide this point, but if it did not do so I should still come to the same conclusion, and therefore I decide this matter not only on authority, but because I think that the decision we have come to is the only reasonable one, and it is not at all a dangerous decision. The statute requires that "the nomination paper shall state the surname and other names of the person nominated," but it does not say how the names are to be spelt. The question is whether, when that which is put in writing is in a form which every person would conclude to be a statement of a particular name and of no other name, it is a statement of that name within the meaning of the statute. In *Reg.* v. *Bradley* (2) the judges had a sufficient knowledge of the world to know that "Wm." was a way of writing "William," and that therefore it was a statement of the name "William" and of no other name. It has been suggested on behalf of the respondent that "Wm." might be an abbreviation for another name, as for instance, for "Wilbraham," but not one man out of a thousand in England if he saw "Wm." would say it meant "Wilbraham," and every other man would say it meant "William." Other instances have been

(1) Law Rep. 4 Q. B. 346. (2) 3 E. & E. 634; 30 L. J. (Q.B.) 180.

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suggested which are clearly not statements of names within the statute. "W." alone would certainly not be understood as indicating the name "William," for it might stand for "Walter." There may be other abbreviations of names which may or not be statements of names such as "Wm." is. It is unnecessary to say whether there are any such or not, but should any fulfil the condition I have mentioned, namely, of being such as to be understood by every one as meaning a name, and one name only, I should say that it would be a statement of a name within the meaning of the statute. I am therefore of opinion apart from authority that the nomination paper objected to does state the christian name "William," and is a sufficient compliance with the statute.

[The learned judge then disposed of the second objection.]

BOWEN, L.J. As to the first point, namely, whether the christian name of the person nominated was sufficiently stated in the nomination paper within the meaning of sub-s. 2 of the 1st section of the Municipal Elections Act, 1875, I think it is concluded by authority. The point is settled by *Reg.* v. *Bradley* (1). It has been argued that that case was decided by applying s. 142 of 5 & 6 Wm. 4, c. 76, and that although "Wm." was not a sufficient statement of the name "William" it was nevertheless a misnomer, and was so cured by that 142nd section. On looking however, through the judgments in that case, and also the judgment in *Reg.* v. *Plenty* (2), I think that the Court in *Reg.* v. *Bradley* (1) did in fact decide that "Wm." was a sufficient statement of the name "William." But I wish to add that persons must not think that every abbreviation will do. We decide that "Wm." will do, because that is an abbreviation which every person must understand as meaning "William" and which can only be so read.

Appeal allowed.

Solicitor for appellants: *J. Balfour Allan, for W. M. Skinner, Sunderland.*

Solicitors for respondent: *Johnson & Weatheralls, for Bowey & Brewis, Sunderland.*

(1) 3 E. & E. 634; 30 L. J. (Q.B.) 180. (2) Law Rep. 4 Q. B. 346.

W. P.

[IN THE COURT OF APPEAL.]

1884
Jan. 28.

THE QUEEN ON THE COMPLAINT OF ISABELLA BERKELEY *v.* THOMPSON AND OTHERS, JUSTICES, AND DUNCAN.

Bastardy—Service of Summons in Scotland—Jurisdiction of Justices—Bastardy Act, 1872 (35 *&* 36 *Vict. c.* 65)—*Summary Jurisdiction Acts* (42 *&* 43 *Vict. c.* 49, *and* 44 *&* 45 *Vict. c.* 24).

By 44 & 45 Vict. c. 24, s. 6, "A court of summary jurisdiction in England and a sheriff court in Scotland shall respectively have jurisdiction by order or decree to adjudge a person within the jurisdiction of the court to pay for the maintenance and education of a bastard child of which he is the putative father," "notwithstanding that such person ordinarily resides, or the child has been born or the mother of it ordinarily resides where the court is English, in Scotland, or where the court is Scotch, in England, in like manner as the court has jurisdiction in any other case":—

Held, that this enactment does not enable a summons under the Bastardy Act, 1872, issued by the justices in England to be served on the putative father in Scotland, and therefore where such summons is served in Scotland and the person so served does not appear at the hearing, the justices have no jurisdiction to make an affiliation order.

ON the 3rd of August, 1883, the complainant, Isabella Berkeley, upon an information alleging that she had been delivered of a bastard child within twelve months before that day, and that Henry Duncan of Cartsdyke, Greenock, in Scotland, was the father of such child, obtained an affiliation summons from one of the justices of the borough of Sunderland, within which she was residing, requiring the said H. Duncan to appear before the justices of the said borough on the 9th of October, 1883, to answer her complaint. The summons was served at Greenock, in Scotland, but when it came on for hearing Duncan did not appear, except by his solicitor, who appeared only to object to the jurisdiction of the justices to hear the complaint.

The justices being of opinion that they had no jurisdiction, declined to hear the complaint, and dismissed the summons. A rule was afterwards obtained in the Queen's Bench Division at the instance of the complainant calling upon the justices and H. Duncan to shew cause why the justices should not hear and determine the complaint.

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The Queen's Bench Division subsequently discharged this rule.

The complainant appealed.

G. Bruce, Q.C., and *Hans Hamilton*, for the appellant. By the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3, jurisdiction to summon the putative father is given to the justices of the borough in which the woman resides, and by s. 4 the order for the maintenance may be made on the appearance of the person so summoned, or on proof that the summons was duly served on him. Here Duncan appeared by his solicitor, and such appearance made it immaterial whether he had been properly served or not, and gave the justices jurisdiction: *Oulton* v. *Radcliffe* (1) and *Reg.* v. *Smith.* (2)

[BRETT, M.R. In the first of those cases the defendant's attorney appeared for him, and in the last the putative father appeared and gave evidence. Here he never appeared, and his solicitor only appeared to protest against the justices hearing the case.]

By the Bastardy Laws Amendment Act, 1872, general jurisdiction in a case of this kind is given to the justices of the place in which the woman resides.

[BRETT, M.R. But you have to get the alleged father to be present before the justices.]

Then apart from and independently of the statute there is power and jurisdiction to serve the summons anywhere within the realm of the United Kingdom. It is true that it was held in *Reg.* v. *Lightfoot* (3) that the service of an affiliation summons beyond the limits of England and Wales was not due service, but Lord Campbell, C.J., dissented in that case from the other members of the Court, and the decision, though binding on the Court below, is not binding on this Court. For the purposes of this case the words of 7 & 8 Vict. c. 101, ss. 2 and 3, on which that case was decided, are the same as those of the Bastardy Act of 1872, and in the opinion of Lord Campbell, C.J., they gave the justices jurisdiction though the summons was served in Scotland.

(1) Law Rep. 9 C. P. 189. (2) Law Rep. 1 C. C. R. 110.
(3) 6 E. & B. 822; 25 L. J. (M.C.) 115.

[BRETT, M.R. It must be intended that by the later Act the legislature meant what the decision of the Court in that case said was the construction of 7 & 8 Vict. c. 101.]

There is, however, power to serve the process in Scotland given by the Summary Jurisdiction Process Act, 1881 (44 & 45 Vict. c. 24). By the 4th section, "subject to the provisions of this Act, any process issued under the Summary Jurisdiction Acts may, if issued by a court of summary jurisdiction in England, and indorsed by a court of summary jurisdiction in Scotland," "be served and executed within the jurisdiction of the indorsing court." By s. 8, "the expression 'process' includes any summons or warrant of citation to appear either to answer any information or complaint, or as a witness," and by s. 7, the Act is to "be in addition to and not in derogation of any power existing under any other Act relating to the execution of any warrant or other process in England and Scotland respectively." Before this enactment a woman who resided in England could not have gone to Scotland and got an affiliation order made there, now she may either do so or get the order in England. Sect. 6 enacts, that "a court of summary jurisdiction in England and a sheriff court in Scotland shall respectively have jurisdiction by order or decree to adjudge a person within the jurisdiction of the court to pay for the maintenance and education of a bastard child of which he is the putative father," "notwithstanding that such person ordinarily resides, or the child has been born, or the mother of it ordinarily resides where the court is English in Scotland, or where the court is Scotch in England, in like manner as the court has jurisdiction in any other case." A summons in a bastardy proceeding is a process under the Summary Jurisdiction Acts, and comes therefore within s. 4 of this Act of 1881. By s. 50 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), the expression "Summary Jurisdiction Acts," shall mean the Act of 1848 (11 & 12 Vict. c. 43), and that Act and any Act amending them. They are Acts merely to regulate procedure, and whether the proceedings are under the Bastardy Acts or not, the process would be regulated by the Summary Jurisdiction Acts and s. 35 of the Act of 1848 (11 & 12 Vict. c. 43) shews that it would have included bastardy summonses and orders but

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for the limitation in that section. By s. 54 of the Act of 1879 (42 & 43 Vict. c. 49) that Act is made to apply to the levying of sums adjudged by a bastardy order, and also to the proof of the service of any summons or process in any matter of bastardy. Sect. 51 of that Act applies the Summary Jurisdiction Acts to any future Act by which a "sum of money is directed or authorized to be recovered before a court of summary jurisdiction." It applies them therefore to s. 6 of 44 & 45 Vict. c. 24, and the summons being then a process under the Summary Jurisdiction Acts, it can be served in Scotland by virtue of s. 4. It is said by the respondents that s. 6 limits the jurisdiction to cases where the person summoned is within the jurisdiction of the court, but that is not its effect. It means that there shall be jurisdiction to the justices to make the order where the person summoned has been brought rightly within their jurisdiction by a summons served according to s. 4.

Poland, appeared for the respondents, but was not called upon.

BRETT, M.R. It is clear to my mind that this case is not within any of the Summary Jurisdiction Acts. The woman who makes the complaint against the alleged father of her illegitimate child resides in England, and the Bastardy Laws Amendment Act, 1872, gives jurisdiction over the subject-matter of her complaint to the justices where she resides, but that is not enough, for they must have also jurisdiction over the person against whom the complaint is made. They have to summon the man to come before them and answer the complaint, and they have power to do so wherever he may be in England, and of course when he has been so summoned, they have power to hear the complaint in his absence, if he make default in appearing. But there was no power before the statute 44 & 45 Vict. c. 24, to bring the man before the justices in England who had jurisdiction over the subject-matter of the complaint unless he was then in England, and if he was not there but in Scotland the woman could not have got an affiliation order, or have instituted any bastardy proceedings against him. Then by 44 & 45 Vict. c. 24, a further remedy is given. That statute deals with the

case of a woman resident either in England or in Scotland, who wishes to charge a person with being the father of her illegitimate child, and s. 6 gives jurisdiction to a court of summary jurisdiction in England, or to the sheriff court in Scotland to make a bastardy order, though it is not the court of the country where she resides. Accordingly where the mother of the child ordinarily resides in England, but the putative father is in Scotland the Scotch court may make such order, and so in like manner if the mother ordinarily resides in Scotland, and the father is in England, the English court of summary jurisdiction may make the order in England. If that be the true construction of that enactment, as in my opinion it is, it gives the mother of an illegitimate child a larger remedy than she had previously, and it enables her to go to Scotland, where the alleged father is and obtain an order there for the maintenance of the child, but it contains no words enabling English justices to make an order in England against the man who is charged with being the father of the child, when the man is resident in Scotland. It was suggested on behalf of the appellant that s. 51 of 42 & 43 Vict. c. 49, would enable the application of the Summary Jurisdiction Acts generally to this case, but s. 54 of that Act shews that though that Act is to "apply to the levying of sums adjudged to be paid by an order in any matter of bastardy" and "to the proof of the service of any summons, notice, process, or document in any matter of bastardy," it leaves out stating where any such summons is to be served, and there is nothing in that Act or in the Act of 44 & 45 Vict. c. 24, which enables the woman to have a summons in England against a person resident in Scotland. When an order in the matter of bastardy has been properly made by the justices in England there is power given in that last Act to follow the person with it into Scotland, but none of the sections seems to me to go beyond that. The legislature, as I think, never meant to give the woman the power of bringing the person charged with being the father of her illegitimate child from one part of the United Kingdom to the other, and to place in her hand so formidable a weapon for making such a charge.

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BOWEN, L.J. I also am of opinion that this appeal should be dismissed. It is unnecessary to decide whether s. 6 of the Act 44 & 45 Vict. c. 24, has increased the jurisdiction of the justices in bastardy proceedings, as it is sufficient to say that it does not touch the case of a summons issued by the justices in England which has to be served in Scotland.

Appeal dismissed.

Solicitors for appellant: *J. E. & H. Scott.*
Solicitors for respondents: *Rooke & Sons.*

W. P.

March 1.

[CROWN CASE RESERVED.]

THE QUEEN *v.* BRITTLETON AND BATES.

Criminal Law—Husband and Wife—Evidence—Larceny by Wife—Witness, Competency of—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 16.

Upon the trial of a married woman jointly with another person for larceny of the property of her husband, the husband was called as a witness against his wife:—

Held, by the Court (Lord Coleridge, C.J., Hawkins, Lopes, and Mathew, JJ.; Stephen, J., doubting), that the evidence of the husband was improperly received, and that the conviction which had taken place founded upon it was bad as against both the prisoners.

THE following case was stated by the Chairman of the quarter sessions of the county of Lancaster, holden at Liverpool:—

"These prisoners were tried before me and other justices at the quarter sessions for the county of Lancaster, held by adjournment at Liverpool on the 15th of January, 1884.

"The prisoners were tried under one indictment, charging them with stealing certain wearing apparel, household goods, and money, the property of Thomas James Brittleton.

"The indictment also contained a count for receiving.

"Thomas James Brittleton was called and sworn as a witness for the prosecution, and stated in evidence that the prisoner, Maria Jane Brittleton, was married to him on the 3rd of July, 1880.

It was then objected by counsel, who at my request appeared for the prisoners, that Thomas James Brittleton was an incompetent witness against the prisoner, Maria Jane Brittleton, on the ground that s. 16 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), did not directly render the evidence of a husband admissible against his wife in the cases in which she was subjected to criminal proceedings by the same section, and that the words, 'in like manner,' did not operate to make the husband a competent witness against his wife.

"Without expressing any opinion as to the validity of the objection, I decided to admit the evidence in order that the point might be reserved for the consideration of the Court of Criminal Appeal.

"The evidence of Thomas James Brittleton was then admitted, and the case proved was in substance that the prisoner Maria Jane Brittleton and the prisoner George Bate together left the house of the witness, Thomas James Brittleton, on the 29th of December, 1882, taking with them the property and money mentioned in the indictment.

"I left the case to the jury, directing them that if they were satisfied that the prisoners feloniously took and carried away the property mentioned in the indictment they were both guilty of larceny. The jury convicted both prisoners of larceny, and the Court sentenced each of them to nine months imprisonment with hard labour.

"The questions for the consideration of the Court are:

"1. Was the evidence of Thomas James Brittleton admissible against his wife, the prisoner, Maria Jane Brittleton?

"2. If the evidence of Thomas James Brittleton was improperly admitted as against his wife, can the conviction of the prisoner George Bate be supported—the two prisoners being jointly indicted?

"If the first question be answered in the negative the conviction of the prisoner Maria Jane Brittleton is to be quashed.

"If the second question be also answered in the negative the conviction of the prisoner George Bate is also to be quashed."

No counsel appeared.

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LORD COLERIDGE, C.J. I should have been glad in this case to have had the assistance of the argument of counsel, since the question raised is one of general importance, and depends upon the meaning to be given to a statute which is not absolutely clear. It is a question arising upon the Married Women's Property Act, 1882, ss. 12 and 16.

The 12th section enacts that every woman, whether married before or after the Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject as regards her husband to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole. And then it proceeds, that in any indictment under the section it shall be sufficient to allege such property to be her property, and that in any proceeding under the section a husband or wife shall either of them be competent to give evidence against the other. It is difficult to say that this section refers to a case in which the husband is indicted: the section has for its primary object the protection and security of the separate property of the married woman, but I suppose the section must mean that where there is an indictment with regard to the wife's separate property either may be competent to give evidence, so that it seems as though a wife could give evidence against her husband.

The 16th section of the same Act provides that a wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under the Act, shall in like manner be liable to criminal proceedings by her husband. Now, does that make a husband a competent witness in an indictment against his wife where the wife is charged with stealing the husband's property? It does not do so expressly, it does not in fact so enact, but only says that the wife stealing her husband's property shall be liable to criminal proceedings just as the husband when he steals the wife's. I cannot say the matter is free from doubt, but it is always best to adhere to the rule by which we construe the words of Acts of

Parliament to mean that which in their natural sense they would be construed to mean, and not to import meanings of our own, or words of our own into Acts of Parliament. The legislature has not said that the husband may give evidence against the wife in cases of this description, and the law apart from this Act is that he cannot. If Parliament had altered the law they should and they would have said so, but they have not said so, I am therefore of opinion that the evidence was not receivable, and that the conviction must be quashed against both prisoners.

HAWKINS, J. I am of the same opinion, and only wish to add one thing, viz., I think that if the legislature had intended the husband to become an admissible witness against his wife, the legislature would have expressed itself in clear and intelligible terms, and I do not find any expression in clear and intelligible terms of any such intention. There are no words making the husband an admissible witness in my opinion.

There is a second question here, whether the indictment being also against another person the fact of the woman's husband giving evidence will vitiate the conviction as against such other person. The case of *Rex* v. *Smith* (1) appears directly in point in this matter, and there is another case which I think also in point, *Reg.* v. *Thompson* (2), and these cases appear to me to shew conclusively that the conviction cannot stand.

LOPES, J. I also think that if the legislature had intended to make so great an alteration in the law the legislature would have expressed itself in unequivocal terms, and that it certainly has not done.

STEPHEN, J. I cannot take quite the same view as has been taken by my Lord and my Brothers Hawkins and Lopes, but at the same time I cannot feel so decided an opinion upon the matter as to induce me to dissent or to desire an argument before the whole bench of judges, and therefore I give up the opinion to which I am rather inclined. Had I been alone to decide this matter I should have been disposed to interpret the section

(1) 1 Moody, C. C. 289. (2) Law Rep. 1 C. C. R. 377.

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thus: the husband and wife shall be competent to give evidence against each other subject to the general rules of evidence, as for example, that the party indicted cannot give evidence at all. The wife, if her husband is indicted, is not denied the benefit of the section against her husband if he steals her goods, and it seems somewhat odd that under precisely similar circumstances the husband should not be able to give evidence against his wife should she steal his goods.

Then I come to s. 16, and that says that a wife shall be liable to be prosecuted if she does anything to her husband's property which would render her husband liable to a prosecution if done by him with regard to her property; this I should have been disposed to say meant substantially that if a wife is to be prosecuted by her husband she is to be treated in a similar way to a husband prosecuted by a wife for anything done with respect to her separate property. I admit that such a view goes somewhat beyond the exact words, and I do not insist upon my own view, and especially as in this particular case the husband and wife were living together when or immediately before the offence was committed.

MATHEW, J. This conviction must, in my opinion, be quashed, the Act is an Act for the protection of the wife and of her property, and the present case is not, in my judgment, within the Act.

Conviction quashed.

C. D.

BRADLAUGH *v.* GOSSETT. 1884 *Feb.* 9.

Parliament—House of Commons—Internal Regulation of its own Procedure—Parliamentary Oaths Act, 1866 (29 *Vict. c.* 19).

The House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its internal procedure only. What is said or done within its walls cannot be inquired into in a court of law.

A resolution of the House of Commons cannot change the law of the land. But a Court of law has no right to inquire into the propriety of a resolution of the House restraining a member from doing within the walls of the House itself something which by the general law of the land he had a right to do, viz., take the oath prescribed by the Parliamentary Oaths Act, 1866 (29 Vict. c. 19).

An action will not lie against the Serjeant-at-Arms of the House of Commons for excluding a member from the House in obedience to a resolution of the House directing him to do so; nor will the Court grant an injunction to restrain that officer from using necessary force to carry out the order of the House.

The plaintiff, having been returned as member for the borough of N., required the Speaker of the House of Commons to call him to the table for the purpose of taking the oath required by 29 Vict. c. 19. In consequence of something which had transpired on a former occasion the Speaker declined to do so: and the House, upon motion, resolved "that the Serjeant-at-Arms do exclude Mr. B. (the plaintiff) from the House until he shall engage not further to disturb the proceedings of the House."

In an action against the Serjeant-at-Arms praying for an injunction to restrain him from carrying out this resolution:—

Held, that, this being a matter relating to the internal management of the procedure of the House of Commons, the Court of Queen's Bench had no power to interfere.

Burdett v. *Abbott* (14 East, 148), and *Stockdale* v. *Hansard* (9 Ad. & E. 1) commented upon and approved.

THE material parts of the statement of claim were as follows:—

The plaintiff, Charles Bradlaugh, was duly elected a burgess to serve in the House of Commons for Northampton, and was entitled to take the oath by law prescribed to be taken by members of the House of Commons, and to sit and vote in the House as one of the representatives of Northampton. In May, 1883, Mr. Bradlaugh required the Speaker to call him to the table for the purpose of taking the oath. The Speaker did not do so. On the 9th of July, the House of Commons resolved, "that the Serjeant-at-Arms do exclude Mr. Bradlaugh from the

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House until he shall engage not further to disturb the proceedings of the House." Mr. Bradlaugh thereupon wrote a letter to the Serjeant-at-Arms asking him whether he understood the order of the House to mean that he was to prevent Mr. Bradlaugh by actual force from entering the House for the purpose of taking his seat. The Serjeant-at-Arms replied that it would be his duty to exclude Mr. Bradlaugh from the House till otherwise instructed by the House or the Speaker.

Some correspondence (set out in an amendment made by consent in the statement of claim) also passed between Mr. Bradlaugh and the Speaker, the effect of which was that the Speaker informed Mr. Bradlaugh that his exclusion from the House would continue "until he should engage not to attempt to take the oath in disregard of the resolution of the House now in force."

The statement of claim claimed,—first, a declaration that the order of the House of July 9th be declared to be beyond the power and jurisdiction of the House to make, and to be void,—secondly, an order restraining the Serjeant-at-Arms from preventing Mr. Bradlaugh by force from entering the House and taking the oath as a member,—thirdly, such further or other relief as he might be deemed entitled to.

To this there was a demurrer, on the ground that the statement of claim did not state any matter for which an action could be maintained, and did not ask any relief which could be by law given in the action.

The case was argued on the 7th of December last before Lord Coleridge, C.J., Mathew, J., and Stephen, J., by the *Attorney-General* (with whom were *R. S. Wright*, and *Danckwerts*), in support of the demurrer, and by the plaintiff in person.

The arguments and the very numerous authorities cited are fully stated and commented upon in the judgments of the Court.

Cur. adv. vult.

Feb. 9, 1884. The following judgments were delivered:—

LORD COLERIDGE, C.J. It was the importance of this case as to the issues which it raised, and the great dignity of the House

of Commons, whose action is in fact questioned in the person of the Serjeant-at-Arms, rather than any difficulty in the legal questions involved, which led me to desire that the judgments pronounced on it should be deliberate. The same reasons lead me to think it fit to express my own judgment separately, though, after reading the judgment of my learned Brother, I feel that the subject is exhausted.

The facts and the pleadings which state them have been so fully detailed by my Brother Stephen that I content myself with referring to and adopting as my own that portion of his judgment which details them. These statements raise the question whether, on the assumption that the resolution of the House of Commons forbade a member of the House within the walls of the House itself to do something which by the law of the land he had a right to do, such a resolution is one which the House of Commons has a right to pass; and whether, if it has not, this Court can inquire into the right, and allow an action to be maintained by a member of the House against the officer of the House charged by resolution of the House itself with the execution of its order.

The plaintiff argued his own case, and argued it with abundant learning and ability; but he admitted that, with all his research, he had not found a single precedent for his action, and that he had found many distinct and weighty dicta of great judges in former days to the effect that no such action could be maintained. Nor, wide as is the range of topics more or less connected with the point at issue, and numerous as are the authorities collected and commented on in the leading cases on the subject, does it seem to me that the questions really to be decided are more than elementary, and such as must be decided mainly on principle.

In this as in so many matters of practical concern difficulties are created by the laying down of principles in terms so wide and general, that, although logic may justify them, the sense and feeling of men imposes upon them in fact limitations which are said not altogether untruly to be sometimes inconsistent with the principle they are supposed to admit. For example, it seems to be conceded that a resolution of the House of Commons only

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(and what is true of one House of Parliament is true of the other) cannot change the law of the land. Sir John Patteson and Sir John Coleridge,—the former especially,—put this point with great force in their judgments in *Stockdale* v. *Hansard* (1): and yet, if the House of Commons is,—as for certain purposes and in relation to certain persons it certainly is, and is on all hands admitted to be,—the absolute judge of its own privileges, it is obvious that it can, at least for those purposes and in relation to those persons, practically change or practically supersede the law.

Again, there can be no doubt, that, in an action between party and party brought in a court of law, if the legality of a resolution of the House of Commons arises incidentally, and it becomes necessary to determine whether it be legal or no for the purpose of doing justice between the parties to the action; in such a case the Courts must entertain and must determine that question. Lord Ellenborough expressly says so in *Burdett* v. *Abbott* (2); and Bayley, J., seems to assume it at p. 161. All the four judges who gave judgment in *Stockdale* v. *Hansard* (3) assert this in the strongest terms. That case, indeed, was an illustration of this necessity. The Attorney General, Sir John Campbell, could undoubtedly have succeeded at nisi prius upon the facts of the case, without raising the question of privilege upon which the arguments and judgments were delivered. But, for reasons perfectly well understood at the time, he forced Lord Denman (who tried the cause) to give the ruling which he was determined to question. It is perhaps not to be regretted that he did so, when the arguments and the judgments which were the result are remembered: but I see no answer to the statements of the judges, at pp. 193 and 243, that, when a question is raised before the Court, the Court must give judgment on it according to its notions of the law, and not according to a resolution of either House of Parliament. Cases may be put, cases have been put, in which, did they ever arise, it would be the plain duty of the Court at all hazards to declare a resolution illegal and no protection to those who acted under it. Such

(1) 9 Ad. & E. at pp. 192, 220. (2) 14 East, 148.
(3) 9 Ad. & E. 1.

cases might by possibility occasion unseemly conflicts between the Courts and the Houses. But, while I do not deny that as matter of reasoning such things might happen, it is consoling to reflect that they have scarce ever happened in the long centuries of our history, and that in the present state of things it is but barely possible that they should ever happen again.

Alongside, however, of these propositions, for the soundness of which I should be prepared most earnestly to contend, there is another proposition equally true, equally well established, which seems to me decisive of the case before us. What is said or done within the walls of Parliament cannot be inquired into in a court of law. On this point all the judges in the two great cases which exhaust the learning on the subject,—*Burdett* v. *Abbott* (1) and *Stockdale* v. *Hansard* (2);—are agreed, and are emphatic. The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive. To use the words of Lord Ellenborough, "They would sink into utter contempt and inefficiency without it." (3)

Whether in all cases and under all circumstances the Houses are the sole judges of their own privileges, in the sense that a resolution of either House on the subject has the same effect for a court of law as an Act of Parliament, is a question which it is not now necessary to determine. No doubt, to allow any review of parliamentary privilege by a court of law may lead, has led, to very grave complications, and might in many supposable cases end in the privileges of the Commons being determined by the Lords. But, to hold the resolutions of either House absolutely beyond inquiry in a court of law may land us in conclusions not free from grave complications too. It is enough for me to say that it seems to me that in theory the question is extremely hard to solve; in practice it is not very important, and at any rate does not now arise.

On the question that does arise, if cases are required there is a remarkable one to be quoted regarding each House,—the case of the *Earl of Shaftesbury* (4), in which the Court of King's Bench

(1) 14 East, 1, 148.
(2) 9 Ad. & E. 1.
(3) 14 East, at p. 152.
(4) 1 Mod. 144.

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altogether declined jurisdiction to inquire as to what had passed in the House of Lords; and the case of *Sir John Eliot* and his fellows, reported fully at the end of Cro. Car. (1) That was a very remarkable case; for, no doubt Sir John Eliot, Mr. Valentine, and Mr. Hollis had held the Speaker in the chair by main force, to prevent his adjourning the House before a motion had been made. They were sued in the King's Bench: they pleaded by demurrer to the jurisdiction that the offences (if any) had been committed in Parliament, and ought to be there examined and punished, and not elsewhere. The demurrer was overruled, and they were heavily fined and imprisoned. Sir John Eliot was killed by the rigours of his imprisonment: Mr. Valentine died; but Mr. Hollis survived: and in 1668 the judgment of the King's Bench was reversed by the House of Lords, on the ground that it was an illegal judgment and against the freedom and privilege of Parliament. These cases seem direct in point; and we could not give judgment for the plaintiff in this action without overruling them.

I need not discuss at any length the fact that the defendant in this case is the Serjeant-at-arms. The Houses of Parliament cannot act by themselves in a body: they must act by officers; and the Serjeant-at-arms is the legal and recognised officer of the House of Commons to execute its orders. I entertain no doubt that the House had a right to decide on the subject-matter, have decided it, and have ordered their officer to give effect to their decision. He is protected by their decision. They have ordered him to do what they have a right to order, and he has obeyed them.

It is said that in this case the House of Commons has exceeded its legal powers, because it has resolved that the plaintiff shall not take an oath which he has a right to take, and the threatened force is force to be used in compelling obedience to a resolution in itself illegal. But there is nothing before me upon which I should be justified in arriving at such a conclusion in point of fact. Consistently with all the statements in the claim, it may be that the plaintiff insisted on taking the oath in a manner and under circumstances which the House had a clear right to object

(1) Cro. Car. 605.

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to or prevent. Sitting in this seat I cannot know one way or the other. But, even if the fact be as the plaintiff contends, it is not a matter into which this Court can examine. If injustice has been done, it is injustice for which the Courts of law afford no remedy. On this point I agree with and desire to adopt the language of my Brother Stephen. The history of England, and the resolutions of the House of Commons itself, shew that now and then injustice has been done by the House to individual members of it. But the remedy, if remedy it be, lies, not in actions in the courts of law (see on this subject the observations of Lord Ellenborough and Bayley, J., in *Burdett* v. *Abbott*, 14 East, 150, 151, and 160, 161), but by an appeal to the constituencies whom the House of Commons represents.

It follows that this action is against principle and is unsupported by authority, and that therefore the demurrer must be allowed, and that there must be judgment for the defendant.

MATHEW, J., concurred in this judgment.

STEPHEN, J. The demurrer admits for the purposes of our decision the truth of the matters stated in the statement of claim. In a few words they are as follows: The resolution of the House of Commons of the 9th of July, 1883, read with the correspondence between the Speaker and Mr. Bradlaugh shews that for reasons which are not before us the House of Commons resolved that Mr. Bradlaugh, who had been duly elected member for Northampton, should not be permitted to take the oath prescribed by law for members duly elected, and that he should be excluded, if necessary, by actual force from the House, unless he would engage not to do so. We are asked to declare this order void, and to restrain the Serjeant-at-arms from enforcing it.

I may observe, before considering this question, that but for the amendment made at the hearing I at least should have felt bound to decide the case on a much narrower ground than that on which I think we ought to deal with it. Taken by itself, the order of the 9th of July states nothing except that the House had by resolution excluded a member, who in the judgment of the House had disturbed its proceedings, till he undertook not

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further to disturb it. It is obvious that we could not interfere with what might be a mere measure of internal discipline. The order as it stands is consistent with the supposition that Mr. Bradlaugh, on presenting himself to take the oath, had in some way misconducted himself, and that the House had ordered him to be excluded till he promised not to repeat his misconduct. With such a measure of internal discipline we obviously could not interfere. The correspondence with the Speaker certainly sets the matter in a different light. I cannot read the statement of claim as asserting less or interpret the demurrer as admitting less than what I have already stated; and this raises the question which the parties probably wished to have decided in a very broad way.

The legal question which this statement of the case appears to me to raise for our decision is this:—Suppose that the House of Commons forbids one of its members to do that which an Act of Parliament requires him to do, and, in order to enforce its prohibition, directs its executive officer to exclude him from the House by force if necessary, is such an order one which we can declare to be void and restrain the executive officer of the House from carrying out? In my opinion, we have no such power. I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable.

Many authorities might be cited for this principle; but I will quote two only. The number might be enlarged with ease by reference to several well-known cases. Blackstone says (1): "The whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.'" This principle is re-stated nearly in Blackstone's words by each of the judges in the case of *Stockdale* v. *Hansard*. (2) As the principal result of that case is to assert in the strongest way

(1) 1 Com. 163. (2) 9 Ad. & E. 1.

the right of the Court of Queen's Bench to ascertain in case of need the extent of the privileges of the House, and to deny emphatically that the Court is bound by a resolution of the House declaring any particular matter to fall within their privilege, these declarations are of the highest authority. Lord Denman says (1): "Whatever is done within the walls of either assembly must pass without question in any other place." Littledale, J., says (2): "It is said the House of Commons is the sole judge of its own privileges; and so I admit as far as the proceedings in the House and some other things are concerned." Patteson, J., said (3): "Beyond all dispute, it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled, that whatever is said or done in either House should not be liable to examination elsewhere." And Coleridge, J., said (4): "That the House should have exclusive jurisdiction to regulate the course of its own proceedings, and animadvert upon any conduct there in violation of its rules or derogation from its dignity, stands upon the clearest grounds of necessity."

Apply the principle thus stated to the present case. We are asked to declare an order of the House of Commons to be void, and to prevent its execution in the only way in which it can be executed, on the ground that it constitutes an infringement of the Parliamentary Oaths Act. (5) This Act requires the plaintiff to take a certain oath. The House of Commons have resolved that he shall not be permitted to take it. Grant, for the purposes of argument, that the resolution of the House and the Parliamentary Oaths Act contradict each other; how can we interfere without violating the principle just referred to? Surely the right of the plaintiff to take the oath in question is "a matter arising concerning the House of Commons," to use the words of Blackstone. The resolution to exclude him from the House is a thing "done within the walls of the House," to use Lord Denman's words. It is one of those "proceedings in the House of which the House of Commons is the sole judge," to

(1) 9 Ad. & E. at p. 114.
(2) At p. 162.
(3) At p. 209.
(4) At p. 233.
(5) 29 Vict. c. 19.

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use the words of Littledale, J. It is a "proceeding of the House of Commons in the House," and must therefore, in the words of Patteson, J., "be entirely free and unshackled." It is "part of the course of its own proceedings," to use the words of Coleridge, J., and is therefore "subject to its exclusive jurisdiction." These authorities are so strong and simple that there may be some risk of weakening them in adding to them. Nevertheless, the importance of the case may excuse some further exposition of the principle on which it seems to me to depend.

The Parliamentary Oaths Act prescribes the course of proceeding to be followed on the occasion of the election of a member of Parliament. In order to raise the question now before us, it is necessary to assume that the House of Commons has come to a resolution inconsistent with the Act; for, if the resolution and the Act are not inconsistent the plaintiff has obviously no grievance. We must of course face this supposition, and give our decision upon the hypothesis of its truth. But it would be indecent and improper to make the further supposition that the House of Commons deliberately and intentionally defies and breaks the statute-law. The more decent and I may add the more natural and probable supposition is, that, for reasons which are not before us, and of which we are therefore unable to judge, the House of Commons considers that there is no inconsistency between the Act and the resolution. They may think there is some implied exception to the Act. They may think that what the plaintiff proposes to do is not in compliance with its directions. With this we have nothing to do. Whatever may be the reasons of the House of Commons for their conduct, it would be impossible for us to do justice without hearing and considering those reasons; but it would be equally impossible for the House, with any regard for its own dignity and independence, to suffer its reasons to be laid before us for that purpose, or to accept our interpretation of the law in preference to its own. It seems to follow that the House of Commons has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned; and that, even if that interpretation should be erroneous, this Court has no

power to interfere with it directly or indirectly. This view of the matter is well illustrated by another part of the Act.

By s. 4 certain persons are permitted to make a declaration or affirmation instead of taking an oath. The question whether this applied to persons permitted by 32 & 33 Vict. c. 68, s. 4, to make a promise instead of taking an oath, arose in the case of the plaintiff himself. It was considered by the House of Commons, and the House took a course which left the interpretation of the enactment to the Courts. It permitted the plaintiff to make the declaration, but declared that it did not intend to interfere with his liability to the statutory penalty if he did so. He made the declaration, took his seat accordingly, and was sued for the penalty. Though the proceedings in that action finally terminated in his favour, they established the proposition that s. 4 of the Parliamentary Oaths Act did not authorize him in making a statutory declaration in lieu of taking an oath. (1) This case appears to me to illustrate exactly the true relation between the House of Commons and this Court as regards the interpretation of statutes affecting them, and the effect of their resolutions on our proceedings.

A resolution of the House permitting Mr. Bradlaugh to take his seat on making a statutory declaration would certainly never have been interfered with by this Court. If we had been moved to declare it void and to restrain Mr. Bradlaugh from taking his seat until he had taken the oath, we should undoubtedly have refused to do so. On the other hand, if the House had resolved ever so decidedly that Mr. Bradlaugh was entitled to make the statutory declaration instead of taking the oath, and had attempted by resolution or otherwise to protect him against an action for penalties, it would have been our duty to disregard such resolutions, and, if an action for penalties were brought, to hear and determine it according to our own interpretation of the statute. Suppose, again, that the House had taken the view of the statute ultimately arrived at by this Court, that it did not enable Mr. Bradlaugh to make the statutory promise, we should certainly

(1) See *Clarke* v. *Bradlaugh*, 7 Q. B. D. 38, 61; *Bradlaugh* v. *Clarke*, 8 App. Cas. 354.

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not have entertained an application to declare their resolution to be void. We should have said that, for the purpose of determining on a right to be exercised within the House itself, and in particular the right of sitting and voting, the House and the House only could interpret the statute; but that, as regarded rights to be exercised out of and independently of the House, such as the right of suing for a penalty for having sat and voted, the statute must be interpreted by this Court independently of the House.

This view of the subject is perhaps most simply and completely illustrated by the 4th section; but it seems to me to apply equally well to the 3rd, and I therefore think that we ought not to make the declaration asked for. I may observe, in conclusion, that, apart from these considerations, I should in any case whatever feel a reluctance almost invincible to declaring a resolution of the House of Commons to be beyond the powers of the House, and to be void. Such a declaration would in almost every imaginable case be unnecessary and disrespectful. I will not say that extraordinary circumstances might not require it, because it is impossible to foresee every event which may happen. It is enough to say that the circumstances which would justify such a declaration must be extraordinary indeed, and that, even if relief had to be given in this case, I should think it sufficient to restrain the Serjeant-at-Arms from acting on the order of the House. I do not dwell upon this, however, as I wish to put my judgment on the plain and broad ground already stated.

That part of the prayer of the statement of claim which asks us to restrain the Serjeant-at-Arms from using force to prevent the plaintiff from entering the House, may be disposed of in a few words. The order is, to exclude the plaintiff from the House; and we cannot suppose that this means more than that the plaintiff is to be prevented by the use of such force as may be absolutely necessary for the purpose from entering such parts of the Houses of Parliament as the order applies to. We should not be warranted either in law or by the use of common experience in supposing that anything else was intended. If, however, this only is intended, I am of opinion that the use of such force is

strictly justifiable. Every private man has the right of preventing a stranger from entering his house by such force, and of authorizing others to act for him if he is unable or unwilling to act for himself; and to say that the House has by law power to exclude one of its members from the House, but has not the power to direct the use of such force for that purpose would be contradictory.

Before leaving this part of the subject, I may observe that in my judgment the case before us differs widely from a possible case suggested in argument in *Burdett* v. *Abbott* (1), as to the effect of an order by the House of Commons to put a member to death or to inflict upon him bodily harm. Of such a case it is enough to say, as Lord Ellenborough said, that it will be time to decide it when it arises. The only force which comes in question in this case is, such force as any private man might employ to prevent a trespass on his own land. I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice. One of the leading authorities on the privilege of parliament contains matter on the point which shews how careful parliament has been to avoid even the appearance of countenancing such a doctrine. This is the case of *Sir John Eliot, Denzil Hollis, and Others,* of which a complete history is given in 3 Howell's State Trials, pp. 294–336. In this case the defendants were convicted in 1629 on an information before the Court of King's Bench for seditious speeches in parliament and also for an assault on the Speaker in the chair. They pleaded to the jurisdiction that these matters should be inquired into in Parliament and not elsewhere; and their plea was overruled. In 1666 this judgment was reversed upon writ of error; one error assigned being that the speaking of the seditious words and the assault on the Speaker were made the subject of one judgment; whereas the seditious speech, if made in parliament, could not be inquired into out of parliament, even if the assault upon the Speaker could be tried in the Court of King's Bench: hence there should have been two separate judgments. This case

(1) 14 East, at p. 128.

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is the great leading authority, memorable on many grounds, for the proposition that nothing said in parliament by a member as such, can be treated as an offence by the ordinary Courts. But the House of Lords carefully avoided deciding the question whether the Court of King's Bench could try a member for an assault on the Speaker in the House.

The plaintiff argued his own case before us at length. It is due to him to state the reasons why his arguments do not convince me. He referred to a great number of authorities; but his argument was in substance short and simple. He said that the resolution of the House of Commons was illegal, as the House had no power to alter the law of the land by resolution; and, admitting that the House has power to regulate its own procedure, he contended that in preventing him from taking his seat, the House went beyond matter of internal regulation and procedure, as they deprived both him and the electors of Northampton of a right recognised by law, which ought to be protected by the law; and so inflicted upon him and them wrongs which would be without a remedy if we failed to apply one. I think that each part of this argument requires a plain, direct answer.

It is certainly true that a resolution of the House of Commons cannot alter the law. If it were ever necessary to do so, this Court would assert this doctrine to the full extent to which it was asserted in *Stockdale* v. *Hansard*. (1) The statement that the resolution of the House of Commons was illegal, must I think, be assumed to be true, for the purposes of the present case. The demurrer for those purposes admits it. We decide nothing unless we decide that, even if it is illegal in the sense of being opposed to the Parliamentary Oaths Act, it does not entitle the plaintiff to the relief sought. This admission, however, must be regarded as being made for the purposes of argument only. It would, as I have already said, be wrong for us to suggest or assume that the House acted otherwise than in accordance with its own view of the law; and, as we know not what that view is, nor by what arguments it is supported, we can give no opinion

(1) 9 Ad. & E. 1.

upon it. I do not say that the resolution of the House is the judgment of a Court not subject to our revision; but it has much in common with such a judgment. The House of Commons is not a Court of Justice; but the effect of its privilege to regulate its own internal concerns practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts of Parliament. We must presume that it discharges this function properly and with due regard to the laws, in the making of which it has so great a share. If its determination is not in accordance with law, this resembles the case of an error by a judge whose decision is not subject to appeal. There is nothing startling in the recognition of the fact that such an error is possible. If, for instance, a jury in a criminal case give a perverse verdict, the law has provided no remedy. The maxim that there is no wrong without a remedy does not mean, as it is sometimes supposed, that there is a legal remedy for every moral or political wrong. If this were its meaning, it would be manifestly untrue. There is no legal remedy for the breach of a solemn promise not under seal and made without consideration; nor for many kinds of verbal slander, though each may involve utter ruin: nor for oppressive legislation, though it may reduce men practically to slavery; nor for the worst damage to person and property inflicted by the most unjust and cruel war. The maxim means only that legal wrong and legal remedy are correlative terms; and it would be more intelligibly and correctly stated, if it were reversed, so as to stand, "Where there is no legal remedy, there is no legal wrong."

The assertion that the resolution of the House goes beyond matter of procedure, and that it does in effect deprive both Mr. Bradlaugh himself and his constituents of legal rights of great value, is undoubtedly true if the word "procedure" is construed in the sense in which we speak of civil procedure and criminal procedure, by way of opposition to the substantive law which systems of procedure apply to particular cases. No doubt, the right of the burgesses of Northampton to be represented in parliament, and the right of their duly-elected representative to sit and vote in parliament and to enjoy the other rights incidental to his position upon the terms provided by law are

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in the most emphatic sense legal rights, legal rights of the highest importance, and in the strictest sense of the words. Some of these rights are to be exercised out of parliament, others within the walls of the House of Commons. Those which are to be exercised out of Parliament are under the protection of this Court, which, as has been shewn in many cases, will apply proper remedies if they are in any way invaded, and will in so doing be bound, not by resolutions of either House of Parliament, but by its own judgment as to the law of the land, of which the privileges of Parliament form a part. Others must be exercised, if at all, within the walls of the House of Commons; and it seems to me that, from the nature of the case, such rights must be dependent upon the resolutions of the House. In my opinion the House stands with relation to such rights and to the resolutions which affect their exercise, in precisely the same relation as we the judges of this Court stand in to the laws which regulate the rights of which we are the guardians, and to the judgments which apply them to particular cases; that is to say, they are bound by the most solemn obligations which can bind men to any course of conduct whatever, to guide their conduct by the law as they understand it. If they misunderstand it, or (I apologize for the supposition) wilfully disregard it, they resemble mistaken or unjust judges; but in either case, there is in my judgment no appeal from their decision. The law of the land gives no such appeal; no precedent has been or can be produced in which any Court has ever interfered with the internal affairs of either House of Parliament, though the cases are no doubt numerous in which the Courts have declared the limits of their powers outside of their respective Houses. This is enough to justify the conclusion at which I arrive.

We ought not to try to make new laws, under the pretence of declaring the existing law. But I must add that this is not a case in which I at least feel tempted to do so. It seems to me that, if we were to attempt to erect ourselves into a Court of Appeal from the House of Commons, we should consult neither the public interest, nor the interests of parliament and the constitution, nor our own dignity. We should provoke a conflict between the House of Commons and this Court, which in itself

would be a great evil; and, even upon the most improbable supposition of their acquiescence in our adverse decision, an appeal would lie from that decision to the Court of Appeal, and thence to the House of Lords, which would thus become the judge in the last resort of the powers and privileges of the House of Commons.

For these reasons I am of opinion that there must be judgment for the defendant.

Judgment for the defendant.

The plaintiff in person.

Solicitor for defendant: *Solicitor to the Treasury.*

J. S.

LEGGOTT *v.* WESTERN.

March 5.

Practice—Charging Orders—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24—*Order XLVI., r.* 1—*Jurisdiction—Debtor and Creditor—Company—Shares—Order for Sale of Shares subject to Charging Order.*

The plaintiff, having recovered judgment in an action, obtained an order absolute under Order XLVI., charging shares of the defendant in a company with the payment of the judgment debt and interest, and then applied to the Court for an order for sale of the shares:—

Held, that s. 24 of the Judicature Act, 1873, did not give the Court jurisdiction to order the sale.

MOTION on behalf of the plaintiff calling on the defendant in the action, and on the Æolus Waterspray and General Ventilating Company, Limited, to shew cause why certain shares in the company belonging to the defendant, and subject to a charging order obtained in the action, should not be sold.

On the 1st of May, 1883, the plaintiff recovered judgment against the defendant for 188*l*. On the 9th of May the plaintiff obtained an order nisi under Order XLVI. and 1 & 2 Vict. c. 110, ss. 14, 15, charging 1975 shares belonging to the defendant in the Æolus Waterspray and General Ventilating Company, with the payment of the judgment debt and interest. On the 11th of June the order was made absolute. On the 15th of February, 1884, the plaintiff gave notice of motion calling on the defendant and

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the company to shew cause "why the shares standing in the name of the defendant in the register of the company should not be sold, and why, if necessary for the purposes of such sale, the register of members of the company should not be rectified by the insertion of the name of the plaintiff in the register as owner of the shares, and why the moneys to arise by the sale should not be paid into Court, and be applied in payment of the sum with which the shares now stand charged," &c.

K. Digby, in support of the motion. The Court has jurisdiction to make an order in the terms of the motion. Before the passing of the Judicature Acts it was necessary to institute a separate suit in equity in order to enforce by foreclosure or sale a charging order obtained under 1 & 2 Vict. c. 110, s. 14. It is contended that s. 24 of the Judicature Act, 1873, empowers the Court to give that relief in the action. It is a relief claimed by way of enforcing the judgment; and it is an equitable right "appearing incidentally in the course of the cause" within the meaning of subs. 4 of s. 24. The words of subs. 7 are wide enough to include this case. The Court "shall grant all such remedies whatsoever" as any of the parties in every cause or matter pending before them "may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in any such cause or matter;" so that all matters in controversy may be finally determined, and multiplicity of legal proceedings avoided. Here the plaintiff has a statutory title to the shares, and a right to realise them by sale; the case is, therefore, within the terms of s. 24. The order for sale is substantially a mode of execution, and the observations of Jessel, M.R., in *Salt* v. *Cooper* (1) apply. If the order for sale be made the register of the company can be rectified under ss. 35 and 36 of the Companies Act, 1862, for the purpose of the sale.

No counsel appeared for the defendant.

LOPES, J. I am of opinion that the Court has no power to make the order asked for in this case. It is necessary to refer to the statute in order to see what was the position of the plaintiff

(1) 16 Ch. D. at pp. 548, 549.

at the time the charging order was made absolute. The words of s. 14 of 1 & 2 Vict. c. 110, are, "such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." It is admitted that before the Judicature Acts it would have been necessary for him to institute separate proceedings in order to obtain a sale or foreclosure of the shares subject to the charging order; but it is contended, under s. 24 of the Judicature Act, 1873, and the observations of the late Master of the Rolls upon that Act in *Salt* v. *Cooper* (1) are relied on to shew, that the Court would now be justified in ordering a sale of the shares by way of enforcing the judgment obtained in this action without it being necessary for the plaintiff to institute separate proceedings. I think the Court has no such power. I think that having obtained the charging order the plaintiff has the same remedies he would have had, and is in the same position as he would have been before the passing of the Judicature Acts, and therefore that it is necessary for him to institute separate proceedings to obtain an order for sale of the shares.

CAVE, J. I am of the same opinion. Under 1 & 2 Vict. c. 110, s. 14, the judgment creditor is entitled to all such remedies as he would have been entitled to if the charge had been voluntarily made in his favour by the judgment debtor. Before the passing of the Judicature Acts it is clear that the judgment creditor must have instituted a separate suit in the Court of Chancery in order to make his charging order available. It is contended that the effect of the Judicature Act, 1873, is to place the creditor in a different position, and in support of that contention we are referred to s. 24. I am of opinion that s. 24, and the different sub-sections thereto, were enacted for the purpose of enabling the High Court of Justice to give all the remedies or relief claimed in any action which, before the passing of the Act, could have been given by a Court of Law, and by a Court of Equity coming to the assistance of a Court of Law. The powers given by the legislature do not extend to enabling the Court to

(1) 16 Ch. D. at pp. 548, 549.

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order a foreclosure or sale in a case like the present where tha relief is not claimed in the action. In the Judicature Act themselves there is no reference to charging orders; but there i in the rules. By Order XLVI., r. 1, orders charging stock o shares may be made by a divisional Court or by a judge, and the effect shall be such as is provided by 1 & 2 Vict. c. 110, ss. 14, 15 The effect of s. 14 is to entitle the judgment creditor to the same remedies as he would have had if the charging order had been created by contract between himself and the debtor. There is not one word in Order XLVI., to shew any intention to increase the power of the Court in respect of enforcing charging orders The effect is to be such as is provided by 1 & 2 Vict. c. 110, and not such as is provided by that Act plus the Judicature Act 1873. I have received no satisfactory answer to the question I asked during the course of the argument, whether, if the plaintiff obtained in an action an interlocutory order against the defendant with costs, and the defendant gave him a mortgage to secure payment of those costs, the Court could in that action order a foreclosure or sale of the property so mortgaged. If it could be done in this case, it could be done in that, but I am of opinion that the Court has no jurisdiction to do it in either, and that the plaintiff must bring a fresh action to enforce his charging order by a sale of the shares.

Motion dismissed.

Solicitors for plaintiff: *Parkers.*

W. A.

HAMMOND *v.* HOCKING.

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Feb. 23.

Bill of Sale—Agreement for payment by Grantor of Insurance Premiums and production and delivery of Receipts—"Maintenance of the Security."—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).

An agreement in a bill of sale of chattels, that the grantor will pay all premiums necessary for insuring and keeping insured the chattels against loss by fire, and forthwith after every payment in respect of such insurance produce, and, if required, deliver to the grantee the receipt or voucher for the same, is not unnecessary for the maintenance of the security, and does not contravene the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43).

APPEAL from the Nottingham County Court.

Interpleader issue.

Chattels seized by the plaintiff, under an execution levied on a judgment against the defendant, were claimed by Stevenson as holder of a bill of sale, dated the 11th of July, 1883, whereby the defendant assigned the goods in a house, shop and premises to the claimant as security for the payment of a loan of 30*l.* and interest at 10*l.* per cent., and agreed that he the defendant would at all times during the continuance of this security duly pay all rent, rates and taxes payable in respect of the said house, shop and premises, and also all premiums and other sums necessary for insuring and keeping insured the said chattels and things against loss or damage by fire in a sum equal to the said principal sum thereby secured, and forthwith after every payment in respect of such insurance produce and if required deliver to the said Stevenson the receipt or voucher for the same, and it was agreed that subject to the provisions of the Bills of Sale Act, 1878, Amendment Act, 1882, the said chattels and things might be seized by the grantee, if the grantor should make default, inter alia, in the performance of any covenant or agreement on his part therein contained. There was also a proviso that the chattels thereby assigned would not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882.

It was objected that the bill of sale was bad on the ground,

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inter alia, that it contained a covenant by the grantor to produce receipts for insurance, and deliver them if required to the grantee, and *Davis* v. *Burton* (1) was cited.

The deputy judge overruled the objection, and in the result gave judgment for the claimant.

Gould, for the plaintiff. By the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9, a bill of sale made or given by way of security for the payment of money shall be void unless made in accordance with the Form in the schedule to the Act annexed. The terms as to insurance are not such as are within the meaning of the form. The chattels assigned are made liable to seizure for a cause other than any of those specified in s. 7. The express allowance in sub-s. 4, of seizure for non-production of "receipts for rents and taxes," excludes a liability to seizure for non-production of any other receipts. Moreover, even sub-s. 4 does not sanction seizure for non-delivery of the receipts therein mentioned. The provision that the receipts for insurance shall be produced, and, if required, delivered to the grantee contravenes the Act and invalidates the bill of sale: *Davis* v. *Burton*. (1)

Stanger, for the claimant, was not heard.

CAVE, J. The question arises on s. 7 of the Act, which was passed for the protection of the borrower from oppression, and while we construe the Act so as to produce the effect intended by the legislature, we ought not, in construing it, to give way to needless technicalities, because if we do so, we shall run the risk of interfering with honest transactions, and also, by rendering bills of sale doubtful and bad securities, make the position of the borrower worse than it was before the Act passed. Sect. 7, sub-s. 1, contemplates that the parties may come to agreements which are "necessary for maintaining the security." If the subject matter of the bill of sale is property which may be destroyed by fire, it is obvious that there must be in the bill of sale a provision for insurance of the subject matter, for the maintenance of the security. This bill of sale contains such a

(1) 10 Q. B. D. 414; 11 Q. B. D. 537.

provision, viz., that the subject matter shall be insured, and that the mortgagor shall pay the premiums of insurance and "forthwith after every payment in respect of such insurance produce and if required deliver" to the mortgagee "the receipt or voucher for the same." Mr. Gould objects that this is not in accordance with the agreement permitted by the statute with respect to the production of receipts for rent, rates, and taxes. But different considerations apply to those receipts. If a tenant in arrear with his rent subsequently pays it, no harm is done. So also as to rates and taxes in arrear. But if a man who is insured does not pay his insurance premiums at the time fixed, the insurance itself is at an end, and the subject matter ceases to be insured. It is necessary, therefore, that there should be a provision somewhat more stringent with respect to receipts for insurance than to those for rent, rates, and taxes. The party who ought to take the initative as to payment is, it seems to me, the mortgagor, because he is the person who receives notice from the insurance office that the time for payment of the premiums will shortly expire, and if the burden were thrown on the mortgagee he might forget to require the premium to be paid within the time limited, and so the insurance would not be maintained, and would become void. Looking at that difference, it seems to me not unreasonable to require that the mortgagor should, after every payment of the insurance premiums, produce the receipts to the mortgagee, and, if required, deliver the receipts to him. It is an agreement which the parties themselves have made, and I cannot see that it is such as renders the bill of sale void. I think it fairly comes within the intent of the Act, and that the objection must be overruled.

A. L. SMITH, J. I am also of opinion that the learned deputy county court judge was right. It is said that the bill of sale is bad, because it is not in accordance with the form in the schedule to the Act of 1882. The legal interpretation of that schedule seems to me to be as stated by the Master of the Rolls in *Davis* v. *Burton* (1), that "nothing substantial must

(1) 11 Q. B. D. 537, at p. 540.

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be substracted from it, and nothing actually inconsistent must be added to it." The real question here is whether any thing actually inconsistent with the Form in the schedule has been added? The Form in the schedule contains a stipulation: "And the said A.B. doth also agree with the said C.D. that he will," and then follow directions viz.: "*here insert terms as to insurance . . . . which the parties may agree to for the maintenance . . . . of the security.*" In this bill of sale the parties agree that the grantor will pay the premiums of insurance, and after every payment produce, and, if required, deliver to the grantee the receipts. That is expressly provided for by the Act, and is not inconsistent with it.

Judgment affirmed.

Solicitors for plaintiff: *Jaques, Layton & Jaques.*
Solicitor for claimant: *W. H. Stevenson.*

J. R.

March 6.

TARN AND ANOTHER *v.* THE COMMERCIAL BANKING COMPANY OF SYDNEY.

Practice—Stay of Proceedings—Executors, Actions by—Probate of Will.

A testatrix, having indorsed and delivered a bill of exchange to her bankers for collection at maturity, died before the bill became due, and her executors, before probate of the will was granted, sued the bankers for a return of the bill or its value.—The defendants were always willing to pay over the proceeds of the bill to the plaintiffs upon production of probate:—

Held, that all proceedings in the action ought to be stayed until the plaintiffs obtained probate.

Webb v. *Adkins* (14 C. B. 401; 23 L. J. (C. P.) 96) followed.

MOTION by way of appeal from an order of Field, J., at chambers.

The action was brought by the plaintiffs, as the executors of the will of Louisa Icely, for the return of a bill of exchange, or for 220*l.*, its value, and damages for its detention.

The defendants were L. Icely's bankers, and in December, 1883, she, in the ordinary course of business, indorsed and delivered the bill to them for the credit of her account.

L. Icely died on the 24th of January, 1884. The bill became due on the 11th of February, 1884, and the defendants placed

the proceeds of it "to the credit of the executors of the will of L. Icely, deceased," in their books.

The defendants having refused to deliver the bill to the plaintiffs, or to pay them the proceeds, unless they produced probate of the will, the writ in the present action was issued.

Upon a summons taken out by the defendants for an order that all proceedings in the action should be stayed on the ground that the same was frivolous, vexatious, and an abuse of the process of the court, the master refused to make the order, and Field, J., affirmed the order of the master.

The affidavit of the defendants' manager, used at the hearing of the summons, stated that the defendants had always been, and then were, willing to hand over the proceeds of the bill to the plaintiffs upon production of probate, and that formal notice of such willingness was given to the plaintiffs' solicitors before action brought.

It was stated that since the hearing before Field, J., probate of the will had been granted to the executors.

R. V. Williams, for the defendants. Before the Common Law Procedure Act, 1852, it was necessary to make profert of all documents mentioned or referred to in the declaration, and the defendant could claim oyer before pleading. That Act abolished profert and oyer, and shortly after it was passed, the Court, in *Webb* v. *Adkins* (1), stayed proceedings in an action by an executor until probate was produced, and notice thereof given to the defendant. That course should be followed here. An executor cannot give a sufficient discharge until he has obtained probate: *Simons* v. *Milman* (2); Williams on Executors, 8th ed. p. 309. A will of later date might be found; or probate of this will might be refused on the ground that it was made under undue influence.

Mattinson, for the plaintiffs. In *Webb* v. *Adkins* (1) the Court did not intend to lay down a general rule. The granting of a stay of proceedings is in all cases discretionary, and under the circumstances of this case the Court should exercise their discretion by refusing to stay. The executors require a fund to pay probate duty, and to meet the first expenses of administra-

(1) 14 C. B. 401; 23 L. J. (C.P.) 96. (2) 2 Sim. 241.

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tion, and they are entitled to resort in the first instance to money or securities in the hands of the deceased's bankers. It was necessary for the executors to obtain possession of the bill in order to complete their title by reindorsing it.

LOPES, J. I am of opinion that this appeal should be allowed. It is material to consider what was the mode of proceeding before the Common Law Procedure Act, 1852. A plaintiff suing as executor before that Act would not have succeeded in making out on his pleadings his title to sue without making profert of probate. In *Webb* v. *Adkins* (1), decided since profert and oyer were abolished by that Act, the Court ordered a stay of proceedings in an action by an executor upon the principle that until probate has been granted there is nobody clothed with any legal title to sue, who could give a valid discharge to the defendant. What we are now asked to do will have much the same effect as the procedure before the Common Law Procedure Act. I think it is a reasonable and proper course to stay proceedings in the present case until the plaintiffs produce probate of the will. They could not succeed at the trial unless the probate was given in evidence. It would be a hardship to call upon the defendants to pay over sums of money, or to hand over securities, to persons who might not have a good title and could not give a valid release.

STEPHEN, J. I am also of opinion that the appeal should be allowed. I do not wish to lay down any general principle, but prefer to rest my decision on narrow grounds. Bankers are in a peculiar position, and when asked to hand over large sums of money to persons claiming as executors of a deceased customer, I think they are justified in requiring to be made safe by production of probate. The case of *Webb* v. *Adkins* (1) seems to point out the course the Court ought to take, and do take, here. The only result of that course is that the plaintiffs will have to pay a small sum of costs, because it appears that since the hearing in chambers the executors have obtained probate.

CAVE, J. I am of the same opinion. There was nothing really

(1) 14 C. B. 401; 23 L. J. (C.P.) 96.

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in dispute in this action. The defendants did not dispute the plaintiffs' title, and were quite ready to give up the money on production of the probate. The plaintiffs must have produced the probate to entitle them to succeed in the action, but they desired in the meanwhile to be allowed to go on incurring costs when there was really nothing to try, and nothing to be done except to take out probate. To permit this to be done would, in my opinion, be to allow the process of the Court to be abused for the purpose of heaping up needless costs. I think *Webb* v. *Adkins* (1) lays down a very sensible rule, and that Field, J. should have applied it in this case.

Appeal allowed.

Solicitors for plaintiffs: *Singleton & Tattershall.*
Solicitors for defendants: *Donnithorne & Ewer.*

W. A.

TATTERSALL *v.* THE NATIONAL STEAMSHIP COMPANY, LIMITED. *March* 11.

Ship—Bill of Lading, Exceptions in, applicable to Matters occurring during the Voyage—Breach of Obligation to provide reasonably fit Ship—Clause limiting Liability of Shipowners, Scope of.

The plaintiff shipped certain cattle on board the defendants' ship for carriage from London to New York under a bill of lading which provided as follows:—"These animals being in sole charge of shipper's servants, it is hereby expressly agreed that the shipowners, or their agents or servants, are, as respects these animals, in no way responsible either for their escape from the steamer or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than 5*l.* for each of the animals." The ship had on her previous voyage carried cattle suffering from foot and mouth disease. Some of the cattle shipped under the bill of lading were during the voyage infected with that disease, owing to the negligence of the defendants' servants in not cleansing and disinfecting the ship before receiving the plaintiff's cattle on board and signing the bill of lading, and the plaintiff in consequence suffered damage amounting to more than 5*l.* for each of the said cattle:—

Held, that the provision in the bill of lading limiting liability to 5*l.* for each of the cattle did not apply to damage occasioned by the defendants not providing a ship reasonably fit for the purposes of the carriage of the cattle which they had contracted to carry.

SPECIAL CASE, of which the facts were in substance as follows:—The action was brought by the plaintiff, as owner of certain

(1) 14 C. B. 401; 23 L. J. (C.P.) 96.

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cows, to recover from the defendants damages alleged to have been sustained by the plaintiff through the said cows having caught the foot and mouth disease whilst being carried in the defendants' steamer from London to New York.

The plaintiff shipped on board the defendants' steamer *France* ten head of cattle, amongst other animals, to be carried on board the said steamer from London to New York upon the terms of a bill of lading. During the course of the voyage some of the said cattle were affected with foot and mouth disease, and were so affected on being landed in New York. On her voyage from New York to London, immediately preceding the voyage now in question, the *France* had on board cattle affected with foot and mouth disease, and the plaintiff's cattle caught the foot and mouth disease while on board the *France*, owing to the negligence of the defendants' servants in not properly cleansing and disinfecting the said steamer before receiving the said cattle on board, and signing the said bill of lading.

By reason of the said cattle having caught the foot and mouth disease, as above stated, the plaintiff sustained damage amounting to more than 5*l.* for each of the said cattle. The bill of lading contained the following exceptions and conditions: "These animals being in sole charge of shipper's servants, it is hereby expressly agreed that the National Steamship Company, Limited, or its agents or servants, are as respects these animals in no way responsible for either their escape from the steamer or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than 5*l.* for each of the animals; all dogs to be placed wherever the captain may appoint, but at the sole risk of the shipper $\frac{\text{and}}{\text{or}}$ owner; the act of God, the Queen's enemies, pirates, robbers, thieves by land or at sea, barratry of master or mariners, restraint of princes, rulers, or people; loss or damage resulting from heat, boilers, steam or steam machinery, including consequences of defect therein, or damage thereto, collision, stranding, or other perils of the sea, rivers, steam and steam navigation; and all damage, loss, or injury arising from the perils or matters above mentioned, and whether such perils or matters arise from the negligence, default,

or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the shipowner."

The question for the opinion of the Court was whether or not under the circumstances the defendants were liable for more than 5*l.* for each of the said cattle. (1)

Petheram, Q.C. (*J. C. Earle,* with him), for the plaintiff. The bill of lading attached when the goods had been put on board, and covers the subsequent period, but this action is in respect of a breach of obligation antecedent to the signing of the bill of lading, a matter which the bill of lading does not cover. The position of the parties was, in respect of this matter, that of bailor and bailee, and there was an implied obligation to use due care about receiving the cattle. The exceptions in the bill of lading relate only to certain classes of perils incident to the voyage, against which, in the ordinary course of business, the shipper insures. [He cited *Steel* v. *State Line Steamship Co.* (2).]

Fox, for the defendants. There is no reason why the plaintiff should not have protected himself against this peril by insurance. The defendants contend that if liable at all they are liable only to the extent of 5*l.* for each of the cattle. The provision of the bill of lading limiting liability is not confined to matters occurring during the voyage, but is in the most general and absolute terms: "under no circumstances" are the defendants to be liable beyond 5*l.* for each animal. It is previously provided that the defendants shall not be liable for accidents, disease, or mortality, but, assuming that that exception would not cover accidents, disease, or mortality occasioned by the negligence of defendants' servants, the subsequent provision is that in no contingency shall the liability exceed a certain amount.

It is clear that a shipowner is entitled to make such a stipulation, just as a railway company might have done before the Railway and Canal Traffic Act: *McManus* v. *Lancashire and Yorkshire Ry. Co.* (3); *Harrison* v. *London, Brighton, and South*

(1) Upon the pleadings in the action all liability was denied by the defendants, but the defendants in the alternative paid into Court 5*l.* in respect of each of the cattle, and it was agreed that this case should be stated to determine whether there could be any further liability.

(2) 3 App. Cas. 72.

(3) 4 H. & N. 327.

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Coast Ry. Co. (1); *Lewis* v. *Great Western Ry. Co.* (2) It could not have been intended that the exceptions and conditions in the bill of lading should apply only to matters occurring during the voyage, for matters occurring through the negligence of "stevedores or other persons in the service of the company" are excepted. The negligence of shore hands before the commencement of the voyage is, therefore, contemplated. *Steel* v. *State Line Steamship Co.* (3) is not in point, for the exception here is much wider, and there was no question there as to a limit of liability, which involves different considerations. The bill of lading is evidence of the contract rather than the contract itself; it is not signed until after shipment of the goods, the contract being, in fact, made long before. There is, therefore, no reason why the bill of lading should be treated as necessarily relating solely to the carriage of the goods and matters subsequent to the shipment: *The Warkworth.* (4)

Petheram, Q.C., was not called on to reply.

DAY, J. I take it to have been clearly established, if not previously, at any rate since the case of *Steel* v. *State Line Steamship Co.* (3), that where there is a contract to carry goods in a ship there is, in the absence of any stipulation to the contrary, an implied engagement on the part of the person so undertaking to carry that the ship is reasonably fit for the purposes of such carriage. In this case it is clear that the ship was not reasonably fit for the carriage of these cattle. There is, therefore, a breach of their implied engagement by the defendants, and the plaintiff having sustained damage in consequence must be entitled to recover the amount of such damage, unless the defendants are protected by any express stipulation. It is argued that the plaintiff cannot recover this damage, at any rate to a greater amount than 5*l.* in respect of each of the animals, by reason of the stipulations in the bill of lading. We have then to consider whether there are any, and, if so, what stipulations in the bill of lading restricting or qualifying the liability of the defendants by reason of their not having provided a reasonably fit vessel for the

(1) 2 B. & S. 122, 152.
(2) 5 H. & N. 867.
(3) 3 App. Cas. 72.
(4) 9 P. D. 20.

purposes of the reception and carriage of these animals. I have considered the terms of the bill of lading, and, as I construe it, its stipulations which have been relied upon all relate to the carriage of the goods on the voyage, and do not in any way affect the liability for not providing a ship fit for their reception. If the goods had been damaged by any peril in the course of the voyage, which might be incurred in a ship originally fit for the purpose of the carriage of the goods, the case would have been wholly different, but here the goods were not damaged by any such peril, or by any peril which, in my opinion, was contemplated by the parties in framing the bill of lading. They were damaged simply because the defendants' servants neglected their preliminary duty of seeing that the ship was in a proper condition to receive them, and received them into a ship that was not fit to receive them. There is nothing in the bill of lading that I can see to restrict or qualify the liability of the defendants in respect of the breach of this obligation, and, therefore, I think our judgment upon the question submitted to us must be for the plaintiff.

A. L. SMITH, J. I am of the same opinion. The real question is what is the true meaning of a very special bill of lading relating to the carriage of certain cattle and other animals; and whether under that bill of lading the plaintiff can recover more than 5*l.* damages in respect of each animal. It is admitted that the damage was occasioned by the negligence of the shipowner's servants before the voyage commenced in not properly cleansing and disinfecting the ship. There is unquestionably a duty on the part of the shipowner to have the ship reasonably fit for the carriage of the goods. The case of *Steel* v. *State Line Steamship Co.* (1) conclusively so decides. Is there then anything in this bill of lading to exempt the defendants from what would primâ facie be their liability in respect of the breach of this duty? I do not think there is. The terms of the bill of lading which have been alluded to appear to me to deal with the contract so far as it relates to the carriage of the goods upon the voyage; they do not in my opinion relate to anything before the commencement

(1) 3 App. Cas. 72.

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of the voyage. It was urged by the counsel for the defendants that the mention of "stevedores" in the bill of lading shewed that the acts of servants of the defendants previous to the voyage were contemplated by the bill of lading. Now the stevedore no doubt is a landsman, but the reason why he is mentioned in this bill of lading obviously is because the mode of stowage of the cargo may very often be the cause of the damage which subsequently arises from sea perils during the voyage. I do not think that the mention of "stevedores" as persons for whose negligence the defendants are not to be liable in any way advances the contention for the defendants. It seems to me that the true construction of the bill of lading is this: as the animals are going to be in the charge of the shipper's servants during the voyage it is agreed that the shipowners shall not be responsible for accidents, disease, or mortality; but it is not denied that this must mean, except accidents, disease or mortality occasioned by the negligence of the defendants' servants. Then it is further stipulated on behalf of the shipowners that "under no circumstances" shall they be liable to a greater extent than 5*l.* for each of the animals. I take the meaning of the whole to be that they are not to be liable for accidents, disease, or mortality arising during the voyage, unless occasioned by the negligence of their servants, and that even in respect of accidents, disease, or mortality so occasioned, they shall only be liable to the amount of 5*l.* So construed the stipulation in no way restricts or affects the primary obligation of the shipowner to have the ship reasonably fit to receive the goods. On these grounds I agree that the judgment should be for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *Baileys, Shaw, & Gillett.*
Solicitors for defendants: *Parker, Garrett, & Parker.*

E. L.

THE GUARDIANS OF LIVERPOOL, APPELLANTS; THE OVERSEERS OF PORTSEA, RESPONDENTS.

1884
Feb. 26.

Poor-Law—Divided Parishes Act (39 & 40 *Vict. c.* 61), *s.* 35—*Widow and Children—Birth Settlement of Father—Derivative Settlement.*

Upon appeal against an order for the removal of a widow and her children, it appeared that the widow had acquired no settlement since her husband's death. Her husband, the father of her children, was born in the appellant parish, but never acquired a settlement for himself, and there was no evidence as to the settlement of his parents:—

Held, that under the 39 & 40 Vict. c. 61, s. 35, the children took a settlement from their father in the appellant parish, and that the order for their removal was right.

CASE stated under 12 & 13 Vict. c. 45, s. 11.

On the 20th of February, 1883, two justices of the borough of Portsmouth made an order adjudging that Verena Ada Meredith and her children William George, aged about nine; George, aged about seven; Ada, aged about five; Minnie Amelia, aged about two and a half; and Thirza Louisa, aged about one year, were settled in the appellants' parish, and directed them to be removed there from the respondents' union.

The pauper Verena Ada Meredith was on the 21st of December, 1871, married to George Meredith, then a soldier in the 46th regiment. The children were born of the marriage, and none of them were born in the appellant parish.

G. Meredith died at Derby on the 9th of March, 1882, and his widow and children (the paupers) came to reside in the respondents' union on the 18th of November, 1882. G. Meredith was born on the 3rd of March, 1842, in Liverpool, within the appellant parish, and was the child of Peter Meredith and Mary Ann his wife.

G. Meredith never acquired a settlement for himself. He entered her Majesty's service as a drummer's boy, and left Liverpool at the age of thirteen, and remained in her Majesty's service until the 13th of July, 1880.

Peter Meredith survived the completion of George Meredith's sixteenth year. Verena Ada Meredith had no other settlement

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than that, if any, acquired by marriage at the time of her husband's death, and has acquired none since.

The question for the opinion of the Court was whether, upon the facts, the order was rightly made.

W. R. Kennedy, for the appellants. First, the children on the death of their father took the settlement of their widowed mother. She derived her settlement from her husband, and the settlement of the children cannot be shewn without inquiring into the derivative settlement of their parent. The children are therefore, under 39 & 40 Vict. c. 61 (1), s. 35, settled in the parish where they were born.

Secondly, assuming that the children took their father's and not their mother's settlement, the settlement of the father of the children could not be ascertained without inquiring into his derivative settlement, for his birth settlement is only a primâ facie settlement. A different construction would make the section inoperative, for the parent must always have a birth settlement. [He referred to *Reg.* v. *Bridgnorth.* (2).]

Charles, Q.C. (*W. M. Barnes*, with him), for the respondents, was not heard.

LORD COLERIDGE, C.J. I have no doubt as to our decision in this case, and I think that the enactment is reasonably clear. It appears that the father of the children had a birth settlement in Liverpool and his wife had no settlement of her own, and therefore acquired her husband's settlement. I am bound to say that I see no reason why the children should not take their father's birth settlement. It is said that a difficulty arises from

(1) 39 & 40 Vict. c. 61, s. 35. No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. If any child in this section mentioned shall not have acquired a settlement for itself, or being a female, shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

(2) 9 Q. B. D. 765; 11 Q B. D. 314.

the words of s. 35, by which a child under sixteen is to take the settlement of its father or widowed mother, as the case may be, and that under these words the children take their mother's which is a derivative settlement. But the words mean that they take the settlement of their father if he be alive, if not any subsequently acquired settlement of the widowed mother. Here the father's and mother's settlement were the same, but they still take their father's settlement. Then it is said that although the language of the section is by itself quite clear, it is prevented from being clear by the proviso, "if it cannot be shewn what settlement such child derived from the parent without inquiring into the derivative settlement of such parent, such child shall be deemed to be settled in the parish in which he or she was born," and that there was some necessity for inquiring into the derivative settlement of the father of these children. But I cannot find any evidence that the father had any derivative settlement, and under these circumstances there is no necessity to inquire into it.

POLLOCK, B. I am of the same opinion, and I agree that the meaning of the section is tolerably clear. Is the case one in which in order to arrive at the proper settlement of the parent it is necessary to inquire into his derivative settlement? I think not. When it is said that children under sixteen shall take the settlement of their father there is no reason why the word "settlement" should not apply to and include a birth settlement.

Judgment for the respondents. Leave to appeal refused.

Solicitors for appellants: *Field, Roscoe, & Co.*
Solicitors for respondents: *Sole, Turner, & Knight.*

A. P. S.

1884
Feb. 23.

POINTON AND BOOT, APPELLANTS; HILL, RESPONDENT.

Vagrant Act (5 *Geo.* 4, *c.* 83), *s.* 3—"*Wandering abroad to beg and gather alms*" —*Idle and disorderly Persons*—*Colliers* "*on strike.*"

Colliers "on strike" who were householders in a colliery district, and had wives and families, went from house to house in a street of a town four miles distant with a waggon inscribed "Children's Bread Waggon," and begged for assistance in money or kind. They were not disorderly. Having been convicted under the Vagrant Act (5 Geo. 4, c. 83), s. 3, which enacts that every person wandering abroad in any public highway to beg or gather alms shall be deemed an idle and disorderly person:—

Held, that, as it was not their habit and mode of life to wander abroad and beg, they were not within the meaning of the Act, and the conviction was wrong.

CASE stated under 20 & 21 Vict. c. 43, by the stipendiary magistrate for Stoke-upon-Trent.

Informations were laid by the respondent against the appellants, charging them that they did on the 5th of October, 1883, at the parish of Burslem, unlawfully wander abroad in a public thoroughfare at Burslem begging and gathering alms.

By 5 Geo. 4, c. 83 (the Vagrant Act), entitled "An Act for the punishment of idle and disorderly persons, and rogues and vagabonds," s. 3, it is enacted, inter alia, that, "every person wandering abroad or placing himself or herself in any public place, street, highway, court, or passage to beg or gather alms . . . shall be deemed an idle and disorderly person," and be liable to imprisonment with hard labour for one month.

On the date aforesaid a number of men who resided at Silverdale, a colliery district in the parish of Wolstanton, and distant four miles from the town of Burslem, which was a distinct parish, were at Burslem in a public street. The appellants were two men of the number. The men were colliers on strike, and had wives, mothers, and families and fixed places of abode at Silverdale, and were householders. Some of the men were drawing a waggon on which was inscribed "Children's Bread Waggon," whilst others called from house to house with collecting books, and begged for assistance in money or kind.

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The appellant Boot went into a shop and asked the shopkeeper therein to assist the miners. Boot had a collecting book with him.

The appellant Pointon went into a private house, and asked a woman there for bread for the children. She gave him a cabbage, which he took from her, and put into the waggon. He had a similar book with him.

It was admitted that the appellants were not disorderly and that their demeanour was not improper.

It was contended that the 5 Geo. 4, c. 83, did not apply to the case, which was analogous to that of a hospital, orphanage, and other charitable institutions for which money, clothing, food, and books are asked of the public, but that the Act was designed for the discouragement of a class of people who wandered about the country with no fixed place of abode, no desire to labour, and no legitimate means of existence.

The magistrate was of opinion that the appellants by their actions were to be deemed persons wandering abroad to beg or gather alms within the meaning of the Act, and that the contention for the appellants that their status, and whether or not they had a fixed place of abode, formed the true criterion by which to judge whether they had committed an act of vagrancy or not, was erroneous, because, as it seemed to the magistrate, the offence might be committed by any person irrespective of his status, and whether or not he had a fixed place of abode, the act committed bringing him within the provision of the statute, the words used in the statute being "Every person wandering abroad," &c. The magistrate therefore convicted the appellants of the offences charged against them and imposed a fine of 5*s.* each and costs upon them.

The question for the consideration of the Court was whether the magistrate's decision was or was not correct in point of law.

Jelf, Q.C. (*J. Rose*, with him), for the appellants. The Vagrant Act is, as its title and preamble shew, for the punishment of idle and disorderly persons, and rogues and vagabonds. The appellants are not of that class. They are working men with homes, who were collecting subscriptions for a lawful purpose, and in an

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orderly manner. A strike is not per se unlawful, and it cannot be an act of vagrancy for working miners to solicit subscriptions in the neighbourhood from persons who probably derive benefit out of the trade of the district. If the construction put upon the Act by the magistrate were correct, every person in whatever position, and however respectable, who went about to ask for charitable contributions might be convicted, ex gr., those who place themselves in the streets on a particular day in the year to solicit offerings for the hospitals. Suppose the appellants, not being out of work themselves, had been collecting money for the aid of others hurt in such a mining accident as is common in their district, they would equally have been liable to conviction.

The respondent did not appear.

CAVE, J. I am of opinion that this conviction must be quashed. The statute is entitled "An Act for the punishment of idle and disorderly persons and rogues and vagabonds," and the first enacting section, 3, after dealing with a number of persons who are variously described, enacts that "every person wandering abroad or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, or causing or procuring or encouraging any child or children so to do, shall be deemed an idle and disorderly person," i.e., is to be deemed a person of idle and disorderly habits of life, and it seems to me that the proper conclusion to be drawn is that the statute was directed against a particular habit and mode of life, and that if persons making it their habit and mode of life to wander abroad or place themselves in public places to beg, do wander abroad and beg and gather alms, they fall within the words of the statute, but if a person—not as a regular mode of living, but—for some object not in itself unlawful, goes from house to house and solicits subscriptions, that is not within the meaning of this Act. The learned counsel stated that on a certain day annually persons place themselves at the corners of the streets to gather alms for the hospitals of London, but it has never yet occurred to anyone that those who do that—not for their own advantage, nor as their regular mode and habit of getting their living, but for a specific

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charitable purpose—are within the provision of the Act. It is found in this case that the appellants are working men, having families, and homes, and that they had had what is called "a strike." There is nothing unlawful in that. They had had a dispute with their employers—unfortunately there are many such disputes between capital and labour. In that the men may be right or wrong, of that we have no means of judging. But it seems to me they were not infringing this Act when they went round in an orderly manner to represent to the public the position of the wives and children of the colliers during the strike, and to ask for assistance by contributions. I find a difficulty in distinguishing that case from the one, common enough in country places, of a poor man who loses his cow, and, with the assistance and encouragement of his neighbours, takes round a paper stating his misfortune, and soliciting assistance to enable him to buy another cow. He, in one sense, wanders abroad to beg or gather alms, but not in the sense intended by this section. It is not done as a habit or mode of life, but for a certain specific purpose intended to be answered, and not again resorted to. That I think is the true distinction to be drawn, and where persons place themselves in the streets to beg as their habit and mode of getting their living,—and the fact of their being there without being able to give any specific account of it is evidence that such is their habit and mode of life—then they fall within the Act; but if they are there—being in their character hard-working and industrious men—and go from house to house for some specific object which is not intended to furnish them with their ordinary means of livelihood, that is not within the Act, and I think that on the facts stated that is what was done, and that this case is not within the Act.

A. L. SMITH, J. I agree in every word of my Brother Cave, who has expressed all that I should have wished to say, and I can add nothing to it.

Conviction quashed.

Solicitors for appellants: *Robinson, Preston, & Stow.*

J. R.

1883
Dec. 19.

[IN THE COURT OF APPEAL.]

IN RE AN ARBITRATION BETWEEN FRASER & Co. AND EHRENSPERGER AND ECKENSTEIN.

Arbitration—Submission in Contract—Appointment of Arbitrator by one Party—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 13—*Revocation of Authority.*

Where there is an agreement to refer a dispute to two arbitrators, one to be appointed by each party, but no agreement to make the submission a rule of Court and, one of the parties having failed to appoint an arbitrator, the other party by virtue of s. 13 of the Common Law Procedure Act, 1854, appoints his arbitrator to act as sole arbitrator, the authority of such arbitrator may be revoked by either party before an award is made.

APPEAL from a judgment of the Queen's Bench Division (Grove and Mathew, JJ.).

The facts, and arguments used in that Court are stated in the judgment.

Finlay, Q.C., and *R. V. Williams*, for Messrs. Fraser & Co.
W. H. Butler, for Messrs. Ehrensperger & Co.

Cur. adv. vult.

Nov. 21. MATHEW, J. This was an application for an order for the payment by Messrs. Ehrensperger & Co. to Messrs. Fraser & Co. of a sum of 1237*l.* 10*s.*, in pursuance of an award made by Mr. Arthur Frederick Williams. The matter had been referred to the Court from Chambers by Field, J.

By a contract dated the 19th of February, 1883, Messrs. Fraser & Co. bought of Messrs. Ehrensperger & Co. a cargo of rice per ship *Hakon Adelsten* expected to sail from Rangoon in March, 1883. The cargo was not shipped, and Messrs. Fraser & Co. demanded an arbitration in respect of the damages for non-delivery of the cargo, under the following clause in the contract: "16. Any dispute arising on this contract, except on quality as already provided for in clause 12, to be referred for settlement to the arbitration of two London brokers or their umpire, one

nominated by the sellers and the other by the buyers, each party having the right of rejecting one nominee."

Messrs. Ehrensperger disputed their liability, first, on the ground that they had signed the contract as agents only, and secondly, that the sale by the terms of the contract was conditional on the arrival of the cargo, and that the cargo had not arrived. They proposed to Messrs. Fraser & Co. to state a special case for the opinion of the Court. The proposal was refused, and on the 31st of May, 1883, a notice was served on Messrs. Ehrensperger & Co. that Messrs. Fraser & Co. had appointed Mr. A. F. Williams as arbitrator, and Messrs. Ehrensperger & Co. were informed that, if they failed to make an appointment under the contract, the arbitrator named by Messrs. Fraser & Co. would proceed alone, under s. 13 of the Common Law Procedure Act, 1854. On the 4th of June, the following notice was sent to Messrs. Fraser & Co.:—

"We, Ehrensperger and Eckenstein, of 17 Water Street, Liverpool, do hereby revoke, annul, and make void all the power and authority which by an agreement in writing dated the 19th day of February, 1883, made between us and Messrs. Fraser & Co. of London respecting a cargo of rice new crop Agalsin per *Hakon Adelsten* were given to the arbitrators to be appointed to award and determine on any dispute arising on the said agreement. And whereas by a notice dated the 31st day of May last the said Messrs. Fraser & Co. informed us that they appointed Arthur Frederick Williams of the Commercial Sale Rooms, Mincing Lane, London, broker, to be an arbitrator under the said agreement for the purpose of settling an alleged dispute, and thereby required us to appoint an arbitrator to act with the said Arthur Frederick Williams in the said intended arbitration; now, we the said Ehrensperger and Eckenstein do hereby discharge and prohibit the said Arthur Frederick Williams from making any award or from any further proceeding in the said intended arbitration.

(Signed) "Ehrensperger and Eckenstein."

On the same day, the following notice was sent by Messrs. Ehrensperger and Eckenstein to Mr. Williams:—

"Sir,—We hereby give you notice that by a writing under

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our hand, dated this day, we have revoked, annulled, and made void your authority as arbitrator; and we hereby discharge and prohibit you from further proceeding in the matter of an intended arbitration concerning alleged disputes between us and Messrs. Fraser & Co. of 40 Mincing Lane, London, arising on a contract of the 19th of February, 1883, relating to a cargo of rice per *Hakon Adelsten.*

"Dated the 4th day of June, 1883.

(Signed) "Ehrensperger and Eckenstein."

On the 21st of June Messrs. Fraser & Co. served a further notice on Messrs. Ehrensperger & Co. that, in consequence of their default, Mr. A. F. Williams would act as sole arbitrator; and on the next day the following notice was served on Mr. Williams:—

"Sir,—We beg to remind you of the notice we gave you on the 4th day of June, 1883, that, by a writing under our hand, dated the said 4th day of June, we had revoked, annulled, and made void your authority as arbitrator, and that we thereby discharged and prohibited you from further proceeding in the matter of an intended arbitration concerning alleged disputes between us and Messrs. Fraser & Co. of 40 Mincing Lane, London, arising on a contract of the 19th of February, 1883, relating to a cargo of rice per *Hakon Adelsten*, and we hereby repeat our prohibition in the matter. Dated, &c.

(Signed) "Ehrensperger and Eckenstein."

Mr. Williams proceeded with the reference ex parte, and awarded to the Messrs. Fraser & Co. 1237*l.* 10*s.* The submission was afterwards made a rule of court, and an application was made at chambers to enforce the award.

It was contended for the Messrs. Ehrensperger & Co. that the revocation of the authority of Mr. Williams was an answer to the application. On the other hand it was argued that, inasmuch as Mr. Williams had been appointed by Messrs. Fraser & Co., his authority could not be revoked by Messrs. Ehrensperger & Co., for whom it was said he was in no sense an agent; and, further, that any right which Messrs. Ehrensperger & Co. may have had

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at common law to revoke the authority of the arbitrator was controlled by s. 13 of the Common Law Procedure Act, 1854, which gave the Court the power of revocation.

We are of opinion that we are bound by the decisions on the subject; more especially by the judgment of the Court of Common Pleas in *Re Rouse and Meier* (1), and must hold that the Messrs. Ehrensperger & Co. had the right to revoke the authority of Mr. Williams to act as arbitrator.

It was said that he was the agent of those who appointed him, and therefore that they alone could put an end to his authority. But the right of Mr. Williams to act as arbitrator was derived from the agreement of both parties, and was therefore, as it seems to us, revocable at the option of either.

Then, with respect to the supposed effect of s. 13 of the Common Law Procedure Act, 1854, upon the right to revoke a submission to an arbitrator who derives his power under the section from the default of one party to the submission, it is sufficient to refer to the case of *Gumm* v. *Hallett* (2), which decides that s. 13 does not apply when, as in this case, the submission is to arbitrators and their umpire.

Apart from this authority, which is binding on us, the cases seem to shew that the Common Law Procedure Act, 1854, was not intended to extend the operation of 3 & 4 Wm. 4, c. 42, s. 39, or to take away the common law right to revoke the appointment of an arbitrator in a case not within the provisions of the latter statute: see *Mills* v. *Bayley* (3), *Re Rouse and Meier* (1), *Thomson* v. *Anderson* (4), and *Randell* v. *Thompson.* (5)

The learned counsel for Messrs. Fraser & Co. relied on the case of *Piercy* v. *Young* (6), and argued that what had been attempted in this case was to revoke the agreement to refer; and, if they were so, it is clear that no such revocation would be operative. But we are of opinion that what was done by Messrs. Ehrensperger & Co. was, to revoke the submission to Mr. Williams; and, as is pointed out by the late Master of the Rolls (7), while a general

(1) Law Rep. 6 C. P. 212.
(2) Law Rep. 14 Eq. 555.
(3) 2 H. & C. 36; 32 L. J. (Ex.) 179.
(4) Law Rep. 9 Eq. 523.
(5) 1 Q. B. D. 748.
(6) 14 Ch. D. 200.
(7) 14 Ch. D. at p. 203.

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agreement to refer cannot be got rid of by either party, a particular submission may be revoked in cases not within the operation of 3 & 4 Wm. 4, c. 42, s. 39.

This application must be refused, but without costs.

Order refused.

J. R.

Messrs. Fraser & Co. appealed.

Dec. 19. *Finlay, Q.C.*, and *R. V. Williams*, for the appellants. It is not denied that at common law either of the parties to a submission to arbitration would have power before the award to revoke the authority of the arbitrator he may have appointed. This however has been altered by the legislature. The 9 & 10 Wm. 3, c. 15, enabled the parties to make the submission a rule of court when if a party revoked he might be punished for a contempt of Court. Then 3 & 4 Wm. 4, c. 42, s. 39, took away this power to revoke when the submission was made in an action or contained an agreement that such submission should be made a rule of court. That Act, however, does not apply to this case, because here the submission was not made in an action, and there was no such agreement. The legislature has gone further in its endeavour to hold the party to his agreement, and has done so by the Common Law Procedure Act, 1854. By s. 11 of that Act power is given to the Court to stay any action which has been brought in contravention of an agreement to refer. Sect. 12 enables a judge to appoint an arbitrator or umpire where there has been a failure to do so by the parties to the agreement to refer or by any of the arbitrators. Then s. 13 deals with a case like the present where one of the parties to a reference to two arbitrators fails to appoint an arbitrator, and it enables in that case the other party who has appointed an arbitrator to "appoint such arbitrator to act as sole arbitrator," and it goes on to say that "an award made by him shall be binding on both parties as if the appointment had been made by consent; provided, however, that the Court or a judge may revoke such appointment on such terms as shall seem just." The appointment in the present case was made under the authority of the 13th section, and a person who was

thereby made such sole arbitrator did not derive his authority from the mandatory of the respondents, but from the 13th section, and there was no power, therefore, to the respondents to revoke his authority; indeed the only power to revoke is that given to the Court or a judge by the proviso at the end of that section. That enactment makes it immaterial whether the party who has failed to appoint an arbitrator consents to the other party appointing the arbitrator to act as sole arbitrator, for it says his award shall be binding "as if the appointment had been by consent," implying therefore that the appointment is made against his consent. This shews that he is not a mandatory of the respondents.

BRETT, M.R. Then according to your argument he is a judge, and his determination is not an award.]

He is in the nature of a judge. What is called a revocation of the submission in the present case was really an attempt to revoke the agreement to refer, which can only be done with the consent of both parties: *Piercy* v. *Young*. (1)

[*Bigham, Q.C.*, for the respondents. It will not be contended that the agreement can be revoked by the respondents only.]

Then there being a valid agreement to refer, what is the effect of s. 13 of the Common Law Procedure Act, 1854? It must be to take away the power to revoke, or there would be no use in giving one party the power to appoint a sole arbitrator when the other refuses to appoint an arbitrator, if such other party can revoke at his pleasure the authority of the sole arbitrator. It is true that the judges in the Queen's Bench Division acted on the authority of *Mills* v. *Bayley* (2), and *Re Rouse and Meier* (3), by which they thought they were bound. In neither of those cases was the arbitrator appointed as here under s. 13 of the Common Law Procedure Act, 1854. Those cases, however, are not binding on the Court of Appeal, and it may adopt, therefore, the reasoning of Bovill, C.J., who dissented from the majority of the Court in *Re Rouse and Meier* (3), and agree with him that the 7th section of the Common Law Procedure Act, 1854, has the

(1) 14 Ch. D. 200. (2) 2 H. & C. 36; 32 L. J. (Ex.) 179.
(3) Law Rep. 6 C. P. 212.

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effect of applying to this case s. 17 of that Act, and s. 39 of 3 & 4 Wm. 4, c. 42.

[BRETT, M.R. In *Vynior's Case* (1) Lord Coke says, "If I make a letter of attorney to make livery or to sue an action, &c., in my name," "or if I submit myself to an arbitrament, although these are made by express words irrevocable, or that I grant or am bound that all these shall stand irrevocably, yet they may be revoked."]

The Court below referred in their judgment to the cases of *Gumm* v. *Hallett* (2), and *Randell* v. *Thompson* (3); but in the first of these it was only held that s. 13 of the Common Law Procedure Act, 1854, did not apply, because the reference was to three arbitrators, and in the last case the Court considered that the agreement to refer had come to an end.

Bigham, Q.C., and *W. H. Butler*, for the respondents were not called on.

BRETT, M.R. In this case the parties agreed if any dispute arose out of the contract of sale to submit the same to the arbitration of two arbitrators and an umpire, one to be appointed by each of the parties. In such a case, if either party refuses to appoint an arbitrator, power is given by s. 13 of the Common Law Procedure Act, 1854, to the other party to nominate a sole arbitrator. Accordingly as one of these parties in this case did not appoint an arbitrator, the other party appointed his arbitrator to act as sole arbitrator in the matter; but before any award was made, the party who had declined to nominate an arbitrator, assumed to revoke the authority of the one who had been so appointed to act as sole arbitrator by his adversary. Nevertheless the arbitrator went on ex parte with the reference, and made what he assumed to be his award, and an application having been made to enforce it, the question is whether under these circumstances there is any award in point of law, for if the submission to the arbitration of this arbitrator was revoked, then it follows there was no award.

(1) 8 Rep. 82. (2) Law Rep. 14 Eq. 555.
(3) 1 Q. B. D. 748.

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The first point which was made by Mr. Williams was that as s. 13 of the Common Law Procedure Act, 1854, gives a power to one party to name what is called an arbitrator when the other party will not join in the appointment of an arbitrator, the person so nominated is not the mandatory of both parties. Mr. Williams was then obliged to say that the person so nominated was not an arbitrator at all, but a judge, and that what he gave as his decision was not an award, but a judgment, and that therefore the authority which was given to him by the Act of Parliament could not be revoked by either of the parties. The judges of England are persons of known character nominated by the Crown to act between different classes of persons, namely all classes who have disputes, and not merely between two particular parties, whereas the person who is here appointed is appointed according to an agreement to determine the dispute which had arisen between these two parties. He is not a judge, but an arbitrator, and therefore is a mandatory deriving his authority from the parties who nominate him. It is not denied that in a case in which an arbitrator has been appointed by each of the parties either of such parties may withdraw his own arbitrator, and that in that case the other arbitrator cannot go on with the reference, and it is also admitted that if a sole arbitrator has been appointed by both the parties either may revoke the submission to him before he has made his award, but it is said that where by s. 13 of the Common Law Procedure Act, 1854, a person has been appointed by either of the parties to act alone in case of a refusal by the other of the parties to appoint an arbitrator, the party who has so refused cannot revoke the authority of such person. That must depend on whether the person who has been so appointed is an arbitrator, and seeing the force of that, Mr. Williams said he was not an arbitrator. In my opinion, however, he is an arbitrator, and the Act of Parliament only interferes in enabling him to be nominated; but when nominated he is what may be called a statutory mandatory, and is as much an arbitrator as any other arbitrator, and equally liable as any other to have his authority revoked, unless there is something in the statute which prohibits this from being done. Then is there anything in the statute which prevents the revocation of his authority? We were referred to

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s. 7, and it is said that that incorporates s. 39 of 3 & 4 Wm. 4, c. 42, and that therefore there is an enactment which prevents either of the parties revoking the submission to arbitration, and in support of this contention the judgment of Bovill, C.J., in *Re Rouse and Meier* (1) was relied on. The decision of the majority of the Court in that case is against the appellants in the present case. We have, it is true, the power of reviewing that decision, but where there is a decision as that is on the course of procedure which has been made more than twelve years ago, and which therefore must necessarily have been frequently acted on during that time, and no one has gone to the Legislature to have it altered, this Court of Appeal, even if it differed from such decision, would not now be disposed to overrule it. I must, however, say that after having read the report of that case, I retain the opinion I then had and for the reasons I there gave, namely, that the 7th section of the Common Law Procedure Act, 1854, applies only to what the arbitrator can do and to what the Court can do, and not to what the parties can do. Therefore, that section does not incorporate s. 39 of 3 & 4 Wm. 4, c. 42, and it cannot be maintained that there is any prohibition by statute against revoking the arbitrator's appointment.

It has next been contended that s. 13 itself of the Common Law Procedure Act, 1854, contains such a prohibition. As to that I adopt the reasons of the three judges in *Re Rouse and Meier* (1), that is to say, that it is one of the incidents of an arbitrator that he is a mandatory, and that by the law of England before the mandate is completed it can be revoked and withdrawn, unless the power to do so has been taken away by the clear words of an Act of Parliament. I find no such words in s. 13, and therefore in my opinion that section does not take away such power. Several cases have been cited, and amongst them the case of *Piercy* v. *Young* (2) before the late Master of the Rolls. That case seems to me to be one which is clearly in favour of the respondents and against the appellants in the present case, for the meaning of what the late Master of the Rolls there said was, that one of the parties could not revoke the agreement to refer, but that he could revoke the submission to a

(1) Law Rep. 6 C. P. 212, at p. 216. (2) 14 Ch. D. 200.

particular arbitrator. I therefore agree with the Court below and for the reasons there given, that there is no award which can be enforced. This appeal consequently must be dismissed.

BOWEN, L.J. I am of the same opinion, and I have very little to add to what has been said by the Master of the Rolls. It is clear that a submission to arbitration might have been revoked at common law, and the question is whether a person who under s. 13 of the Common Law Procedure Act, 1854, is appointed to act as sole arbitrator is an arbitrator within the meaning of the common law rule, or whether, although called an arbitrator he is really not one, but is a person who may exercise an indefeasible power of binding both parties. On looking at that statute, I see nothing which can have that meaning. I think that enactment intended that, though there should be power to appoint an arbitrator where one of the parties has failed to appoint one, still when so appointed he is not to be the less an arbitrator within the meaning of the common law rule. Our attention has been called to the proviso at the end of that s. 13, but I do not think that because that proviso gives a power to the Court or a judge to revoke the appointment, that enables or disenables either of the parties to do so. I have only further to add, that I agree with the Master of the Rolls that the 7th section of the Common Law Procedure Act, 1854, does not bring this case within 3 & 4 Wm. 4, c. 42, s. 39.

Appeal dismissed.

Solicitors for Fraser & Co: *Linklater & Co.*

Solicitors for Ehrensperger & Co: *Sharpe, Parkers, & Co., for Jevons, Ryley & Style, Liverpool.*

W. P.

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Feb. 9.

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Criminal Law—Defamation—Leave to file Information—Libel upon Deceased Foreign Nobleman—Applicant resident Abroad—Discretion of Court.

Upon application for leave to file a criminal information in respect of a libel upon a deceased foreign nobleman made by his representative who was not resident in this country :—

Held, that the Court, in the exercise of its discretion, must reject the application, for the rule to be collected from the modern decisions is that a criminal information for libel can only be granted at the suit of persons who are in some public office or position, and not at the suit of private persons :

Held, also, that the fact that the applicant does not reside in this country is a strong reason for rejecting such an application.

Semble, that an application for a criminal information for a libel upon a deceased person made by his representative will not be granted.

Application for a rule calling upon the defendant to shew cause why a criminal information should not be filed against him for a libel upon the deceased father of the applicant.

The facts and arguments sufficiently appear in the judgment.

1883. May 10, 11. *Sir Hardinge Giffard, Q.C.*, and *Archibald* (*Woodfall*, with them), in support of the application.

C. Russell, Q.C., and *Poland*, for the defendant, referred to *Prynne's Case* (1); *Rex* v. *Critchley* (2); *Rex* v. *Alderton* (3); *Rex* v. *Williams* (4); *Rex* v. *Lord George Gordon* (5); *Rex* v. *D'Eon* (6); *Rex* v. *Peltier* (7); *Rex* v. *Pocock* (8); *Ex parte Chapman* (9); *Reg.* v. *Gregory*. (10)

Archibald, in reply.

Cur. adv. vult.

Feb. 9. The judgment of the Court (Lord Coleridge, C.J., and Denman, Field, Hawkins, and Mathew, JJ.), was delivered by

Lord Coleridge, C.J. This was a case in which a foreign nobleman applied to this Court for a rule calling upon the

(1) 5 Mod. 459.
(2) 4 T. R. 129, n.
(3) Say. 280.
(4) 5 B. & C. 595.
(5) 22 How. St. Tr. 176.
(6) 1 W. Bl. 510.
(7) 28 How. St. Tr. 529.
(8) Str. 1157.
(9) 4 Ad. & E. 773.
(10) 8 Ad. & E. 907.

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defendant, the proprietor of the newspaper *Truth*, to shew cause why a criminal information should not be filed against him in this Court for a libel published in his paper upon the deceased father of the foreign nobleman.

The applicant resides abroad, and the affidavit on which the rule was moved for was sworn out of this country. The alleged libel stated that the father of the applicant had been "an army contractor who was nearly hanged on the charge of supplying as meat to a French army corps the flesh of soldiers who had died in hospital or who had been killed in battle. Luckily for him the first Empire came to an end before the trial could take place, and the contractor, having retired to Italy and purchased a dukedom, became a grand seigneur, and an ardent adherent of the Bourbons."

Several points were made against the rule,—that the applicant was a foreigner, and a foreigner not residing or even sojourning in this country; that the subject of the paragraph was not the applicant, but the applicant's deceased father; that in any view it was not a case in which this Court in its discretion would interpose by way of extraordinary remedy, but would leave the applicant to indict or bring an action. There was another point as to the fiat of the Attorney General: but as upon this point the Court has already given judgment in the case of *Reg.* v. *Yates* (1), and as on that point of law the decision of the majority of the Court binds us, it is not necessary to notice this question further.

As to the point that the present Duke of Vallombrosa, the applicant, is neither resident nor sojourning in this country, it may be sufficient to observe that we do not intend to lay it down as a rule of law that this Court will not interfere under any circumstances by way of criminal information on the application of a person so situated. Cases may be put, or may actually arise in fact, in which this Court would interfere beyond all question, if the person applying to it were an English subject or were resident in England, and the single fact that the applicant was situated as the applicant is situated here might not in such a supposable case be an answer to the application. But it

(1) 11 Q. B. D. 750.

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is obvious that, if we have regard to the principles on which from very early times this Court has acted, the non-residence of the applicant in England is a very cogent argument against the interference of the Court. It makes it as a general rule very unlikely that there should be any intention to provoke a breach of the peace on the part of him who publishes the defamatory matter, and also generally speaking very unlikely that in fact any breach of the peace will follow. It is a matter, therefore, very important for the Court to consider when the appeal is to its discretion: a reason further why, in the exercise of that discretion, the Court should be unwilling to interfere. We do not preclude the duke from his remedy, if he thinks fit to pursue it, by way of action or indictment: but, in this particular case, we should be prepared on this ground to discharge the rule.

Next, as to the point that the subject of the libel is dead, the authorities are not absolutely conclusive, but it seems to us that the weight of authority inclines upon the whole in favour of the objection. The *locus classicus* upon this subject is the judgment of Lord Kenyon in *Rex* v. *Topham.* (1) He points out (at p. 128) that the general statement in 5 Rep. in the case *De Libellis Famosis* (2), that publications defamatory of dead persons are libellous, was a statement extra-judicial, that it did not go to the point in judgment, and that the judgment might well have been sustained without going into it. He shews further that the passage in Hawkins (3), which deals with informations as well as ordinary indictments, puts the whole *criminality* of libels on private persons, as distinguished from the *civil* liability of those who publish them, on their tendency to disturb the public peace. Hawkins, indeed, in a passage immediately following the words quoted by Lord Kenyon, put his own view beyond all doubt, and shews that he would have discouraged, or even disallowed, many of the indictments for libel, to say nothing of informations, with which the Courts of late years have been occupied. For, he says: "The Court will not grant this extraordinary remedy, *nor should a grand jury find an indictment,* unless the offence be of such signal enormity that it may reasonably be

(1) 4 T. R. 126. (2) 5 Rep. 125a.
(3) 1 Hawk. P. C. c. 28, s. 3.

construed to have a tendency to disturb the peace and harmony of the community. *In such a case* the public are justly placed in the character of an offended prosecutor to vindicate the common right of all, though violated only in the person of an individual; for the malicious publication of even truth itself" (this, it must be remembered, was written when truth could not be pleaded to *an indictment*) "cannot in true policy be suffered to interrupt the tranquillity of any well-ordered society." The case in Carthew (1), —a strange and unsatisfactory case, and very loosely reported,— Lord Kenyon explains, as he does also *Rex* v. *Critchley* (2), by stating that in both cases an intention to subvert and slander the government of the country was charged in the indictment, and supports both cases distinctly on this ground. It may be doubted, if the cases are looked at, whether Lord Kenyon did not support the decisions (what the actual decision in the case in Carthew was does not appear) upon grounds which the judges who decided them did not think of, which most certainly they did not state. In *Rex* v. *Paine* (3), King William, one of the persons libelled, was alive, and Queen Mary only, the other person libelled, was dead. The case, therefore, is a very weak one on the point now before us in any view of it. The libel in *Rex* v. *Critchley* (2) stated of a certain Sir Charles Nicoll, who was dead, that "he changed his principles for a red ribbon, and voted for that pernicious project, the excise." This was the whole libel; and Lord Kenyon may well have been puzzled to uphold the propriety of a criminal information in respect of it, even though the deceased Sir Charles was the father of the wife of a Secretary of State. But in the case itself, in which the libel on a deceased Lord Cowper was of the most virulent possible description, imputing to him "unmanly vices and debaucheries," Lord Kenyon, after time taken to consider, with the assent of Buller, J., who had tried the case, arrested the judgment on the ground that it was not the subject-matter of indictment for libel to asperse the memory of the dead, unless it was done with a design to break the peace. The Court of King's Bench in the

(1) *Rex* v. *Paine*, Carth. 405.

(2) 4 T. R. 129.

(3) Carth. 405.

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case of *Rex* v. *Topham* (1), appear to assent to the principle laid down by Hawkins, that private character is to be vindicated by private action; and that an indictment or information for libel is then only to be justified when there are some incidents in it which concern the public, such as, an attempt to injure the government, or an intention or tendency to break the public peace. The necessity of the person who applies for the criminal information being himself individually aspersed, is laid down in very strong terms by Patteson, J., in *Reg.* v. *Mead.* (2) There is no instance of an action for libel by the representative of a deceased person; it must be, I think, some very unusual publication to justify an indictment or information for aspersing the character of the dead. If such a case should ever arise, it must stand upon its own foot. But this is not that case; and on this ground also we should in our discretion decline to interfere.

There remains to be considered the more general objection, viz., that this form of proceeding being in the discretion of the Court, the case before us is not one in which that discretion, which must be legal and exercised on legal principles, ought to sanction the filing of the information. From the very nature of the case it is useless to examine, because it is not possible to reconcile, the various decisions on the subject. However much men may honestly endeavour to limit the exercise of their discretion by definite rule, there must always be room for idiosyncracy; and idiosyncracy, as the word expresses, varies with the man. But there is besides this, that of which every student of legal history must be aware, the leaning of the Courts for a certain time in a particular direction, balanced at least if not reversed by the leaning of the Courts for a certain time in a direction opposite. The current of legal decision runs often to a point which is felt to be beyond the bounds of sane control; and there is danger sometimes that the retrocession of the current should become itself extreme. Many of us are old enough to have seen, or at least to have heard from those who have seen, the great diversity of which I have spoken in the matter of granting rules for criminal information.

(1) 4 T. R. 126. (2) 4 Jur. 1014.

It is much too late to question the perfect legality of criminal informations. The 4 & 5 Wm. and Mary, c. 18, to which so much reference was made in the argument, is conclusive to shew their legality. It was a statute passed to correct the abuse of them, and to fix the conditions on which for the future they were to be allowed; the statute either assuming that the Court had power to allow them or conferring that power if it did not exist. But two years before the passing of this statute their legality had been denied in the case of Mr. Prynne (1), by Sir Francis Winnington, who in the course of a very learned argument stated that Lord Hale himself had said that on argument they could not stand. Lord Holt decided however to the contrary, intimating that Lord Hale must have been speaking only against the abuse of them.

Without going through the list of cases since the days of Lord Holt, it is certain that at times they have been granted by the Court under circumstances and for reasons which could hardly satisfy now the discretion of this Court. For example, in *Rex* v. *Kynnersley* (2), a rule was made absolute against the proprietor of a paper for giving a ludicrous account of the then Lord Clanricarde's appearing with an actress in a theatre; Lord Mansfield observing as his chief reason apparently that "it was high time to stop this intermeddling in private families." It is not necessary to go through the cases: but the practice of granting these informations appears to have reached its greatest height in the time of Lord Tenterden. In *Rex* v. *Epps* (3), there was a rule granted against a man for saying that the clergy in general and the applicant in particular, were harsh and rigorous in exacting their tithes. The excitement on the subject of tithes was actually given by Lord Tenterden as a reason for making the rule absolute. In *Rex* v. *Rintoul* (3) the whole libel was this: "The amount of public money received by the Somersets since the late Duke of Beaufort came of age far exceeds the value of the estates which he bequeathed to the present duke." "Whatever may be the opinion of others," said Lord Tenterden,

(1) 5 Mod. 459.

(2) 1 W. Bl. 294.

(3) T. T. 1831.

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"it is our opinion *that this is a libel.*" And apparently upon no other ground the rule was made absolute. In *Rex* v. *Smith* (1) there had been a riot at Oxmoor followed by conviction of the rioters. The defendants after the trial and conviction published an advertisement soliciting subscriptions for the prisoners, and asking (*inter alia*) whether a large number of acres (under an inclosure), including thirty-one in lieu of tithes, had been given to Sir Alexander Croke, and whether Oxmoor Common before had not been tithe free? Sir Alexander Croke denied the facts suggested, and had published a pamphlet on the subject. The defendant swore that he believed the proceedings against him arose from his having supported a candidate for the county opposed in politics to Sir Alexander Croke. Under these circumstances, this Court actually made a rule absolute for a criminal information.

It is needless to multiply examples. These are selected almost by chance from a number of other cases equally opposed to later practice; and in all of them Lord Tenterden was the presiding judge. Lord Tenterden was a great and upright magistrate, and needs no eulogy from me. But it is impossible for any one not to see the great change which had come over the feeling of the Court between the days of Lord Hale, Lord Holt, and Hawkins, and those of Lord Tenterden.

But the general dissatisfaction of the profession with this state of things led in the time of Lord Denman and Lord Campbell to a much stricter practice in this Court in the granting of these informations. I am quite aware that *Reg.* v. *Gregory* (2), *Reg.* v. *Latimer* (3), and a few cases of this sort occurred during this period of time; but there can be no doubt that the cases were rare except where some person in a public or official position was attacked in relation to such position, or where the attack was of so cruel and outrageous a sort as to make it, according to the view of Hawkins, a matter which interested the public and called for interference of the Court as representing the public and charged with the defence of its interests.

So it was during the greater part of the time of Sir Alexander

(1) M. T. 1831. (2) 8 Ad. & E. 907.
(3) 15 Q. B. 1077.

Cockburn; though towards the close of his life the practice of the Court became somewhat easier and laxer. I have, however, by the kindness of a learned friend been furnished with the reports of fifty cases of criminal information running over the years from 1860 to 1880 inclusive; and out of these fifty cases four only were cases of informations granted at the suit of persons who were not in some public office or position; and during that time there were repeated declarations by various members of the Court, not indeed that as matter of law the information would not be granted at the suit of private persons, but that the Court would as a general rule leave private persons to their private remedies. For example, in *Reg.* v. *Lord Winchelsea*, in 1865, Blackburn, J., says "this remedy had usually and properly been confined to cases of magistrates, ministers, public officers, and persons in a high position whose character was of such public importance as to require immediate vindication." The Lord Chief Justice (Sir Alexander Cockburn) adds, that "the extraordinary intervention by means of a criminal information was a procedure of a high prerogative character reserved for cases of public importance."

In the case of *Reg.* v. *Headley*, in 1875, I find Blackburn, J., reported as saying, "It is not enough that it should appear that there has been a libel" (differing apparently in terms from Lord Tenterden, who seems, if rightly reported, to have thought it *was* enough); "it must also appear that it is a publication as to which we ought to put the prerogative process of the Court in operation against the writer. It should not be done too lightly, or otherwise our jurisdiction to grant criminal informations, though very useful, may be brought into odium." Again in 1877, in the matter of a gentleman named Middleton, in which the libel was very gross the rule was refused, and I find Mellor, J., with the concurrence of Lush, J., saying this: "We must be chary of making the high jurisdiction of this Court a sort of substitute for the ordinary jurisdiction of the magistrates. The Court used to be far more strict in the exercise of its extraordinary jurisdiction in granting criminal informations than it has been perhaps in later times: but this is hardly a case for its exercise. It is not like the case of a serious imputation on a

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magistrate or a public officer like a town-clerk for misconduct in his office." Again, in 1878, in the case of an application on the part of the musical critic of the *Times* newspaper against the present defendant for imputing to the applicant personal corruption, the rule was refused by Mellor, J., and Huddleston, B., the Court saying that "the libel was one which might well warrant an indictment or an action, but it did not follow that it was the fit subject of a criminal information. That was the exercise of the extraordinary jurisdiction of the Court which as a general rule was reserved for cases of libel upon persons in an official or judicial position, and filling some office or post which made it for the public interest necessary that such jurisdiction should be exercised for the refutation of the libellous charges made."

Examples might be multiplied; but these are sufficient. Very few of these cases are to be found in the volumes of reports. They are cases of discretion, and turn generally upon facts, and have seldom been reported; and the passages which I have been reading have been furnished to me by a gentleman of the Bar, who reported them for a newspaper, and who is able to vouch for the substantial correctness of his own reports. The circumstance that so few cases on this subject out of the many which come before the Court are to be found in the books must be my excuse, if I need one, for citing reports from a newspaper, which, however accurate and valuable they may be for their own objects, are generally reported rather with a view to the facts than to the law; and to cite which, therefore, except where there seems to be, as here, a real reason for it, would be of bad example.

I am able from my own recollection to state two cases—each of them I think important. This Court in the time of Lord Campbell refused Sir Charles Napier a criminal information for a libel imputing to him great misconduct in regard to his conquest of Scinde, on the ground, amongst others, that he had ceased to be commander-in-chief in India, and was at the time of his application to the Court only a private person. And a rule for a criminal information in the case of *Reg.* v. *Plimsoll*, in which I was myself counsel, was discharged after argument, for a libel in which a member of parliament was accused of sending his

ships to sea overloaded, in order that they might sink, and he might gain the insurances on them. The rule was discharged without costs, inasmuch as the applicant had cleared his character; but the Court left him to his ordinary remedy as a ship-owner against any one who libelled him in that character.

We are thus brought down to the last case upon the subject, with the authority of which we were pressed very properly. I mean *Reg.* v. *Yates.* (1) I know nothing of the merits of the case; and, if I did, as the litigation is still depending, it would be unfit to say a word. But a libel upon the private character of Lord Lonsdale, certainly not so aggravated as some of those to which informations have been refused, was made the subject of an application to this Court, and the rule for a criminal information was made absolute. It is said that it was granted almost as of course, because the applicant was a peer. The case is unreported, and I am unaware of what my learned Brothers may have said; but if this was the ground, I must respectfully dissent from it. I can find nowhere any trace of the doctrine that a peer, as such, is entitled to exceptional and most important privileges in the administration of the law. If a peer is libelled *as a peer* for his conduct in parliament, or as Lord Lieutenant (if he is one), or as magistrate, or as the holder of a public office, it would undoubtedly be almost of course (all other legal conditions being fulfilled) that the Court should interfere in his behalf. But that a peer in private matters is entitled to any interference at the hands of this Court which the Court would not extend in favour of the humblest subject of the Queen, I respectfully but emphatically deny. I am not aware of any authority for such a proposition (*Reg.* v. *Gregory* (2) is certainly no such authority), and I decline to make one.

It is said, on the other hand, that the point now under consideration was not taken, or at any rate not pressed upon the Court, in *Reg.* v. *Yates* (1); and the probable explanation of this, which I understand on the best authority to be the fact, is this, that when several of the cases decided in the latter years of Sir Alexander Cockburn were brought before the Court, it was felt that a Divisional Court must act on those later authorities, which no

(1) Not reported upon this point. (2) 8 Ad. & E. 907.

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doubt formed a complete justification for the course taken by the Court.

I have said, however, that it is not possible to reconcile the cases; it is not easy, perhaps it is not possible, to lay down any rule which can guide discretion amidst the ever-varying facts to which discretion has to be applied. If we go back to principle, we find it well stated by Blackstone (1), "The objects of the other species of informations filed by the master of the Crown Office upon the complaint or relation of a private subject, are, *any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind* not peculiarly tending to disturb the government (for, those are left to the care of the Attorney-General), but, *which on account of their magnitude or pernicious example, deserve the most public animadversion.*" And, if the passage in Starkie be looked at, in which he defends the proceeding by way of criminal information, which he calls "a proceeding irreconcileable with the ordinary principles of jurisprudence on which the law of libel in England is founded," it will appear at once that that great writer would have met the application before us with a summary refusal, and as not at all within those considerations which, in spite of the anomaly of the proceeding, bring about a result far more beneficial than might have been expected.

It is under these circumstances that, acting under the powers conferred by the Judicature Acts, I have ventured to bring together five judges of the High Court, to establish, if possible, upon unusual authority some principles for our guidance in future.

My colleagues, with a slight exception to be noticed hereafter, concur in this judgment; and I trust that the full discussion which this rule has received may be of some advantage; and that the grounds on which we discharge it becoming generally known, the practice of the Court may be brought back to that greater and more wholesome strictness which prevailed for at least a generation and a half; and that criminal informations may hereafter be granted only in cases which come fairly within the language of Sir William Blackstone already quoted, which I will not repeat, and which I certainly cannot improve.

(1) Book iv. c. 23, p. 309.

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The rule must therefore be discharged; but, according to the opinion of all my learned Brothers, from which I will not formally dissent, it will be discharged without costs.

My Brother Denman, while concurring in the main in this judgment, has written a few words which he desires me to read.

DENMAN, J. I agree with the Lord Chief Justice that the rule ought to be discharged on the two first grounds upon which he rests his judgment; but I desire to add that I cannot accept the passage from Blackstone (1) upon which he comments as being quite an exhaustive description of the cases in which the Court ought to interfere. For example, if a newspaper or an individual were to shew by repeated attacks, and by wide circulation of those attacks, upon a private individual, whether a British subject or a foreigner, whether resident in England or abroad, a persistent determination to persecute, as at present advised I should think it would be the duty of the Court to protect the individual by granting a rule, and even, in case of further persistance, by making it absolute.

Rule discharged.

Solicitor for plaintiff: *Benbow, Saltwell, & Tryon.*
Solicitors for defendant: *Lewis & Lewis.*

(1) Book iv. c. 23, p. 309.

A. P. S.

1884
Feb. 13.

[IN THE COURT OF APPEAL.]

IN RE JAMES (A LUNATIC).

Lunatic—Bankrupt—Leave to Committee to file Declaration of Insolvency—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4 (*f*), 148.

Where it appears to be for the benefit of a lunatic that he should be made bankrupt, the Court will give leave to the committee in the name of the lunatic to file a declaration of insolvency, or to present a bankruptcy petition under the Bankruptcy Act, 1883, s. 4 (f).

THE lunatic in this case was a mineral water manufacturer at Brighton. He was found lunatic by inquisition on the 28th of February, 1882, and his wife was appointed committee of his personal estate.

The business of the lunatic was afterwards carried on by his wife for his benefit, but the estate was now insolvent, the debts amounting to about 213*l.*, and the assets being estimated at about half that amount. One of the creditors had obtained judgment against the lunatic for 30*l.* 8*s.* 5*d.*, and had issued execution, and the sheriff had taken possession of his machinery and stock-in-trade, and advertised the sale for the 11th of February.

Under these circumstances the committee took out a summons, which was adjourned into Court, asking for permission to file in the Court of Bankruptcy in the name of the lunatic a declaration of his inability to pay his debts, or to present a petition in his name against himself.

Evidence was produced to shew that in the event of a bankruptcy the principal creditors were willing to consent to an allowance being made for the maintenance of the lunatic.

Fischer, Q.C., for the committee. The order is asked for in order that the lunatic may commit an act of bankruptcy under the Bankruptcy Act, 1883, s. 4 (f), so that the sale may be stopped and the assets may be administered in bankruptcy and divided among the creditors. This will be for the benefit of the

lunatic, because not only will the assets be disposed of to better advantage, but the principal creditors will be more willing to come to an arrangement by which some provision may be made for him.

The Court has jurisdiction to do this if it appears to be for the benefit of the lunatic: *Ex parte Roberts* (1); *In re Cahen* (2); *In re Lee* (3). The Bankruptcy Act, 1883, s. 148, expressly provides that a lunatic may act by his committee, or curator bonis.

Daw, for the next of kin, made no objection to the application.

EARL OF SELBORNE, L.C., said that it appeared to be for the benefit of the lunatic that he should be made a bankrupt; and he was therefore of opinion that the Court ought to make the order asked for.

LORD COLERIDGE, C.J., and COTTON, L.J., concurred.

Solicitors: *Willoughby & Winch; Warne, Brighton.*

(1) 1 Mont. & Ch. 653. (2) 10 Ch. D. 183.
(3) 23 Ch. D. 216.

M. W.

1884
Feb. 22.

[IN THE COURT OF APPEAL.]

EX PARTE PRATT. IN RE PRATT.

[Birmingham, No. 1 of 1884.]

Bankruptcy Petition—Receiving Order—Act of Bankruptcy committed before the 1st of January, 1884—Pending Liquidation Proceedings—Proof of Act of Bankruptcy—Appearance of Debtor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, 5, 7, 169—*Bankruptcy Rules,* 1883, *rr.* 139, 262, 263, 264.

A receiving order can be made on a bankruptcy petition presented under the Bankruptcy Act, 1883, founded on an act of bankruptcy committed before that Act came into operation, but in respect of which no bankruptcy proceedings had been taken before that date. And the fact that liquidation proceedings under the Bankruptcy Act, 1869, were pending when the Act of 1883 came into operation, and that those proceedings afterwards came to an end by reason of the creditors failing to pass any resolution, does not affect the power of the Court to make the receiving order.

If, on the hearing of a bankruptcy petition, the act of bankruptcy alleged is not strictly proved, but the debtor appears and does not raise the objection, and a receiving order is made, he cannot on an appeal from that order raise the objection.

THIS was an appeal from a decision of the Judge of the Birmingham County Court.

On the 30th of November, 1883, David Pratt filed a liquidation petition under the Bankruptcy Act, 1869, in the county court. The first meeting of the creditors was held under the petition, and was adjourned to the 2nd of January, 1884. On that day the creditors met, and separated without passing any resolution and without again adjourning the meeting. On the 3rd of January, George Kynock, a creditor of Pratt for 287*l.* 12*s.* 4*d.*, presented a bankruptcy petition against him under the Bankruptcy Act, 1883, asking that a receiving order might be made in respect of Pratt's estate, and alleging that he had committed an act of bankruptcy on the 30th of November, 1883, by filing the liquidation petition. The debtor gave notice of his intention to oppose the petition, on the ground that he had not committed any act of bankruptcy available against him for adjudication under the provisions of the Bankruptcy Act, 1883. On the hearing of the petition the act of bankruptcy was not strictly

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proved, but the debtor, who appeared, took no objection on this ground. The judge made a receiving order, though he expressed great doubt whether he had power to make it. The debtor appealed.

Cooper Willis, *Q.C.*, and *H. Stubbins*, for the appellant. The act of bankruptcy on which bankruptcy proceedings can be founded under the Act of 1883 must be an act over which the Court has jurisdiction; the act relied on here is one which cannot be committed under the Act of 1883. The acts of bankruptcy mentioned in ss. 4 and 5 of the Act of 1883, are future acts, i.e., acts committed after that Act came into operation. No proceeding under the Act of 1883 can be founded on an act of bankruptcy committed before that Act came into operation. It has already been decided by Mr. Justice Mathew, on an ex parte application, that, if an act of bankruptcy has been committed by non-compliance with a debtor's summons under the Act of 1869, a bankruptcy petition founded on it must be presented under that Act. If this is not so, the debtor will be liable to an adjudication under the old Act, and to a receiving order under the new Act. In s. 5 of the new Act the words are "if a debtor *commits* an act of bankruptcy;" in s. 6 of the Act of 1869, the words are in the past tense: "that the debtor has" done one of the various things specified in that section. This is an important distinction. The filing of the liquidation petition under the Act of 1869, though it contained a declaration of the debtor's inability to pay his debts, was not an act of bankruptcy under sub-s. 1 (*b*) of s. 4 of the Act of 1883, for such a declaration must be filed "in the Court," and by s. 168 "the Court" is defined as meaning "the Court having jurisdiction in bankruptcy under this Act."

Proceedings under the Act of 1869, can still be carried on before Mr. Justice Cave, for, by s. 93, the jurisdiction of the London Bankruptcy Court is transferred to the High Court, and in proceedings under the Act of 1869 Mr. Justice Cave has now the powers which formerly belonged to the Chief Judge in Bankruptcy under that Act: *Ex parte Chandler* (1); Bankruptcy Rules, 1883, rr. 262, 263, 264.

At any rate in the present case a receiving order could not be

(1) W. N. (1884) p. 29.

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made, because, there being on the 1st of January, 1884, pending liquidation proceedings, there was then existing a right of the creditors to have an adjudication of bankruptcy made, and a liability of the debtor to be adjudicated a bankrupt, under the power given to the Court by sub-s. 12 of s. 125 of the Bankruptcy Act, 1869, a power which can be exercised, although no liquidation resolutions have been passed: *Ex parte McHenry* (1), and this right and the corresponding liability are kept alive by s. 169 of the Act of 1883, notwithstanding the repeal of the Act of 1869, as to all proceedings under the Act of 1869 which were pending on the 1st of January, 1884. Another objection is that the alleged act of bankruptcy was not proved as is required by s. 7 (2) and r. 139: *Ex parte Rogers.* (2)

Creed, for the petitioning creditor, was not heard.

COTTON, L.J. Two objections have been taken to the order; (1) that a receiving order cannot be made under s. 5 of the Bankruptcy Act, 1883, unless the act of bankruptcy relied on is an act committed under the Act of 1883, i.e., committed after that Act came into operation; (2) that, independently of that, there are clauses in s. 169 of the Act of 1883 which (notwithstanding the repeal of the Bankruptcy Act, 1869) preserve the right of the creditor to obtain an adjudication of bankruptcy against the debtor, and continue the liability of the debtor to be adjudicated a bankrupt under the Act of 1869, in any case in which proceedings under that Act were pending when the Act of 1883 came into operation, and it is said that in the present case such proceedings were then pending, and that they are continued, and have ousted the creditor's right to an adjudication under the Act of 1883, if, but for the pendency of those proceedings, he would have had such a right.

I will deal with the first point first. Now s. 4 provides that "a debtor commits an act of bankruptcy" in each of the cases therein specified. And by s. 5, "subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy the Court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate." The conditions

(1) 24 Ch. D. 35. (2) 15 Ch. D. 207.

there referred to are specified in s. 6, and it is admitted that among them there is not to be found any provision that the act of bankruptcy must be one committed after the Act of 1883 came into operation. The words of s. 5 are, "If a debtor commits *an act* of bankruptcy." I am rather struck with the difference between the frame of s. 6 of the Act of 1869 and that of s. 5 of the Act of 1883. Sect. 6 of the Act of 1869 provided that a creditor for a sum of not less than 50*l.* "may present a petition to the Court, praying that the debtor be adjudicated a bankrupt, and alleging as the ground for such adjudication any one or more of the following acts or defaults, hereinafter deemed to be and included under the expression 'acts of bankruptcy.'" Therefore, under that section the creditor's right to obtain an adjudication is founded on his shewing that one of the acts or defaults specified in the section has been committed by the debtor. Sect. 5 of the Act of 1883 proceeds on a different footing. No doubt acts of bankruptcy made such by that Act must be committed after the Act came into operation, but, if s. 5 had been intended to have the effect which is suggested, I should have expected that it would have been framed in the same way as s. 6 of the Act of 1869. Sect. 5, however, says, "if a debtor commits *an act of bankruptcy*," not "*one of the acts of bankruptcy mentioned in this Act.*" I am of opinion that the expression, "an act of bankruptcy," includes everything which by legislative enactment is made to be an act of bankruptcy, whether by this Act itself or by some other Act passed before it came into operation, and I think that no reliance can be placed on the word "commits" as shewing that only acts of bankruptcy committed after the Act came into operation are intended. I think that the true meaning of s. 5 is this, that a receiving order may be made if, at the time when the petition is presented, the debtor has committed an act of bankruptcy, whether by virtue of the Act of 1883, or by virtue of previous legislation before that Act came into operation.

The second objection depends upon the construction of s. 169, which, after repealing as from the commencement of the Act the enactments described in the 5th schedule (including the Bankruptcy Act, 1869), proceeds, "(2.) The repeal effected by this Act shall not affect—(*a*) anything done or suffered before the

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commencement of this Act under any enactment repealed by this Act; nor (*b*) any right or privilege acquired, or duty imposed, or liability or disqualification incurred, under any enactment so repealed; nor (*d*) the institution or continuance of any proceeding or other remedy, whether under any enactment so repealed or otherwise, for ascertaining any such liability or disqualification. (3.) Notwithstanding the repeal effected by this Act, the proceedings under any bankruptcy petition, liquidation by arrangement, or composition with creditors under the Bankruptcy Act, 1869, pending at the commencement of this Act shall, except so far as any provision of this Act is expressly applied to pending proceedings, continue, and all the provisions of the Bankruptcy Act, 1869, shall, except as aforesaid, apply thereto, as if this Act had not passed." This objection divides itself into two. In the first place, it is urged that, the act of bankruptcy alleged being the filing of the liquidation petition, which contained a declaration of the debtor's insolvency, the committing of that act of bankruptcy gave a right to all the creditors to present a bankruptcy petition, and imposed on the debtor the liability to be adjudicated a bankrupt. It is said that notwithstanding the repeal of the Act of 1869, that right and that liability are preserved, and the proceeding to adjudicate the debtor a bankrupt must be taken under the Act of 1869. In my opinion this is not the kind of right or liability which is pointed at by sub-s. 2 (*b*), of s. 169. A number of Acts are repealed by s. 169, and by those Acts certain rights were given to creditors, and certain liabilities imposed on debtors, such, for instance, as the right to issue an elegit and the liability to have goods seized under an elegit, and I am of opinion that this is what is meant by a "right acquired" or a "liability incurred" under one of the repealed enactments, and not the right to obtain an adjudication of bankruptcy, or the liability to be adjudicated a bankrupt.

The second point is this. It is said (and I think this is the right construction), that the liquidation proceedings in the present case were, within the meaning of sub-s. 3, "pending" at the commencement of the Act of 1883 (whether they are or are not now pending), and that, but for the repeal of the Act of 1869, those proceedings might have been continued, and the Court, under the power given by sub-s. 12 of s. 125 of the

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Bankruptcy Act, 1869, might, on the failure of the creditors to pass any resolution, have substituted proceedings in bankruptcy for the liquidation proceedings. Here the creditor is proceeding on his independent right to present a petition, and why is he to be deprived of that right, which he would have had under the Act of 1869, because the proceedings were pending at the commencement of the Act of 1883? The proceedings were pending in such a way that advantage might have been taken of them to obtain an adjudication of bankruptcy in either of two ways. If the Act of 1869 had remained in force, when the liquidation proceedings came to an end by reason of the failure of the creditors to pass any resolution, the Court would have had power, under s. 125, sub-s. 12, to adjudicate the debtor a bankrupt, and any creditor might also have proceeded by an independent petition of his own to obtain an adjudication, taking advantage of the previous act of bankruptcy committed by the filing of the liquidation petition. I am of opinion that the creditor ought not to be deprived of that right simply because of the pendency of the proceedings at the commencement of the new Act. This objection cannot, therefore, prevail, and I am of opinion that, if a proper case was shewn, the judge had power to make a receiving order.

With regard to the objection that there was no proof of the act of bankruptcy, I am of opinion that this highly technical objection ought not to prevail. If the debtor does not appear on the hearing of the petition, no doubt the creditor must prove everything which is required for the making of the order. But in the present case the debtor appeared at the hearing, and argued the point that the Court had no jurisdiction to make the order, but took no objection to the want of evidence of the act of bankruptcy: and there is admittedly on the files of the Court evidence which, in my opinion, was, under the circumstances, amply sufficient to justify the judge in making the order.

BOWEN, L.J. I also am of opinion that a receiving order can be made, not only in respect of acts of bankruptcy committed after, but also in respect of acts of bankruptcy committed before the Bankruptcy Act, 1883, came into operation. It appears to me that there is considerable reason for this conclusion, for other-

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wise there would be certain acts of bankruptcy which could not be made the ground of an adjudication of bankruptcy or a receiving order, simply because no proceedings had been taken in respect of them before the 1st of January, 1884. This would cause great inconvenience, for the result of it would be simply to pass a sponge over a number of acts of bankruptcy committed while the Act of 1869 was in operation, simply because no proceedings had been taken during that period, while at the same time the Act of 1883 carefully keeps alive all proceedings which were at its commencement pending under the Act of 1869. This great incongruity adds probability to the conclusion at which I should have arrived independently of it. If it were not so sub-s. 2 (*d*) and sub-s. 3 of s. 169 would be tautologous, and this would be to make the Act unnecessarily obscure. I think that the more the Act is studied the more it will be found that it is framed in a very peculiar way. I do not mean to say that it is inartistically framed. I think it is framed on the idea that a bankruptcy code is being constructed, and when the present tense is used, it is used, not in relation to time, but as the present tense of logic. I think that is the true view of it.

I think there is nothing in the second point. If what has happened now had happened before the Act of 1883 came into operation, an adjudication of bankruptcy could have been made against the debtor, not only under the power given to the Court under sub-s. 12 of s. 125 of the Act of 1869, but on a petition presented by any of the creditors. I think that since the commencement of the Act of 1883 it is exactly the same; the Court has still power to make an adjudication under that sub-section, but I do not see why a creditor should not also be able to obtain a receiving order on his own petition. If this be true, it throws considerable light on the first question; it is most unlikely that the creditors should be entitled to the benefit of a past act of bankruptcy in the one way but not in the other.

With regard to the objection that no proof was given of the act of bankruptcy, one objection cuts the throat of the other. Both of them cannot be right, and I think they are both wrong. The complaint is that there was no proof of the filing of the liquidation petition. How could that be when it is clear that the

debtor himself was complaining that there were liquidation proceedings? There is a good old-fashioned rule that no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him, to turn round and say, "You have no jurisdiction." You ought not to lead a tribunal to exercise jurisdiction wrongfully.

FRY, L.J. I am of the same opinion. It is evident that on the coming into operation of the new legislation there were two classes of cases which might require to be specially provided for, (1), cases in which proceedings had been taken under the Act of 1869 before the Act of 1883 came into operation; (2), cases in which an act of bankruptcy had been committed under the Act of 1869, but no proceedings had been taken under that Act. The first class of cases is dealt with by s. 169 of the Act of 1883; the second class, I think, comes within s. 5. Sect. 4 declares what are to be "acts of bankruptcy," but it contains no negative words providing that those acts of bankruptcy, and those alone, are to be the subject of proceedings under the Act. Then s. 5 says that "if a debtor commits *an act* of bankruptcy," a receiving order may be made. I entirely agree with Bowen, L.J., as to the meaning of the present tense in this section; it is used, I think, to express a hypothesis, without regard to time, just as in stating the proposition "if A. is B., then B. is C." It is equivalent to saying, "if at the time when the petition is presented the debtor shall have committed an act of bankruptcy." This construction of the Act appears to me convenient and just; the result of it is that proceedings already instituted under the Act of 1869 are saved by s. 169, but new proceedings, founded on acts of bankruptcy committed before the 1st of January, 1884, are to be taken under the new Act.

As to the third point, I agree with the other members of the Court.

Solicitors for debtor: *Sargent & Son, Birmingham.*

Solicitor for petitioning creditor: *Joseph Fallows, agent for William Fallows, Birmingham.*

W. L. C.

1884
Feb. 22.

[IN THE COURT OF APPEAL.]

EX PARTE CHINERY. IN RE CHINERY.

[No. 36 of 1884.]

Bankruptcy Notice—"Final Judgment"—Garnishee Order absolute—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52). *s.* 4, *sub-s.* 1 (*g*).

A garnishee order absolute is not a "final judgment" against the garnishee within sub-sect. 1 (g) of sect. 4 of the Bankruptcy Act, 1883, and the judgment-creditor who has obtained the order cannot issue a bankruptcy notice against the garnishee in respect of it.

THIS was an appeal from an order made by Mr. Registrar Murray granting a receiving order in respect of the estate of David Chinery.

On the 8th of November, 1883, T. D. Bellamy recovered judgment in an action in the Queen's Bench Division against Lesley Chinery for 232*l.* 6*s.* 3*d.* On the 9th of November Bellamy obtained a garnishee order nisi against David Chinery, attaching all debts owing or accruing due from him to Lesley Chinery, to answer the judgment recovered against him by Bellamy, and on the 19th of November this order nisi was made absolute. It ordered the garnishee forthwith to pay to the judgment creditor the debt due from the garnishee to the judgment debtor (or so much thereof as might be sufficient to satisfy the judgment debt), and that in default thereof execution might issue for the same. The judgment debt was not paid, and on the 16th of January, 1884, Bellamy served on D. Chinery a bankruptcy notice, claiming payment of the 232*l.* 6*s.* 3*d.* "as being the amount due on a garnishee order absolute obtained by him against you." In this notice the words "garnishee order absolute" were substituted for the words "final judgment" in the form of bankruptcy notice, No. 6, given in the Appendix of Forms to the Bankruptcy Rules, 1883. This notice was not complied with by D. Chinery within the seven days limited for the purpose, and on the 24th of January Bellamy presented a bankruptcy petition against him, alleging that he was indebted to the petitioner in the sum of 232*l.* 6*s.* 3*d.* on the garnishee order absolute, and that he had

committed an act of bankruptcy in not complying with the requirements of the bankruptcy notice. On the 12th of February the registrar made a receiving order on the petition. D. Chinery appealed.

Ellis J. Davis, for the appellant. The bankruptcy notice was not in accordance with the Form No. 6, given in the Appendix to the Bankruptcy Rules, 1883; it did not say that the sum claimed was "the amount due on a final judgment."

But, as a matter of substance, a garnishee order absolute is not a "final judgment" within the meaning of subs. 1 (g), of sect. 4 of the Bankruptcy Act, 1883. The proceedings to obtain a garnishee order are not proceedings at common law to obtain payment of a sum of money, they were instituted in the first instance by the Common Law Procedure Act, 1854, and have been continued by the Orders under the Judicature Acts: Rules of Supreme Court, 1883, Order XLV.

R. Vaughan Williams, for the petitioner. A garnishee order absolute is a final judgment; nothing more has to be done; execution can at once issue against the garnishee for the amount necessary to satisfy the judgment debt: Rules of Supreme Court, 1883, Order XLV., rr. 1—4. Under the practice at first introduced by the Common Law Procedure Act, 1854, s. 54, a writ was issued against the garnishee, if he disputed his liability, and if he failed the final result was a judgment against him: Day's Common Law Procedure Acts. 4th ed., p. 516, Form 29. This form of procedure is not now used, but a garnishee can still have an issue: Rules of Supreme Court, 1883, Order XLV., r. 4. Under the Judicature Act every order of the Court may be enforced in the same manner as a judgment to the same effect: Rules of Supreme Court, 1883, Order XLII., r. 24.

[BOWEN, L.J. That is to say, an order, not being a judgment, may be enforced as if it was.]

The proceeding by the judgment creditor against the garnishee is in substance an action against him, resulting in a judgment. The intention of subs. 1 (g) was only that there must be a debt evidenced by a final order of the Court.

[COTTON, L.J. There was no debt due from the garnishee to

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the petitioning creditor; he has attached a debt which was due by the garnishee to another person.]

The question is, with reference to what point of time are the words "debtor" and "creditor" used in subs. 1 (g)? The crucial words are "if he (the debtor) does not comply with the requirements of the notice." It is sufficient that the creditor and the debtor should stand in that relation at the time at which the debtor makes default in complying with the bankruptcy notice.

[FRY, L.J. You say it is enough if the relation of debtor and creditor exists by virtue of the judgment; it need not have existed previously?]

The words may mean that, and, if they may, they must, otherwise great inconvenience would arise. A judgment on a claim for unliquidated damages would be excluded. Such claims are in some cases provable in bankruptcy: Bankruptcy Act, 1883, s. 37.

[FRY, L.J. Subsect. 1 (e) of s. 4 makes it an act of bankruptcy if execution issued against a debtor "has been levied by seizure and sale of his goods under process in an action in any court, or in any civil proceeding in the High Court." You are asking us to hold that the word "action" in subs. 1 (g) includes "any civil proceeding."]

Under the Judicature Act the consequences of an "order" and a "judgment" are the same: Rules of Supreme Court, 1883, Order XLII., rr. 24, 26; why should the consequences be different under the Bankruptcy Act?

[BOWEN, L.J. Rule 119 of the Bankruptcy Rules, 1883, requires that an office copy of the judgment on which a bankruptcy notice is founded shall be produced to the registrar on the application for the issue of the notice.]

The Judicature Act was not intended to alter rights. Prior to that Act the judgment creditor would have obtained a judgment against the garnishee. The procedure is now altered, but the right remains the same. In either case there is a judicial declaration of the right.

COTTON, L.J. I think everything which could be said in support of the order has been said by Mr. Vaughan Williams. The appeal is against a receiving order. The act of bankruptcy

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relied on is that which is mentioned in sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883, "if a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him in England or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained, &c." That which the petitioning creditor in the present case has in fact obtained is a garnishee order absolute, and the question we have to consider is whether, on the fair interpretation of the words of the sub-section, such an order is a "final judgment." Now, in legal language, and in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a "judgment" and an "order." No doubt the Orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment, but still judgments and orders are kept entirely distinct. It is not said that the word "judgment" shall in other Acts of Parliament include an "order." I think we ought to give to the words "final judgment" in this sub-section their strict and proper meaning, i.e., a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established—unless there is something to shew an intention to use the words in a more extended sense. Is there then anything in this sub-section which shews such an intention? Undoubtedly, a garnishee order absolute is a final order in the proceeding in which it is obtained, but is it a final judgment in the sense which I have mentioned? I think there is a good deal to be found in this sub-section which is against that view. It speaks of a "final judgment" obtained by a creditor against his debtor. To

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my mind this points to a liability of the debtor to the creditor being established in an action, and not to a proceeding of this kind, which is not an action, but a statutory proceeding, for the purpose, not of establishing any liability of the garnishee to the person who obtains the order, but of attaching a debt due by the garnishee to the debtor whose liability to the judgment creditor had been established by the judgment in the action. The latter part of the sub-section, I think, confirms this view, and indeed, everything in it, in my opinion, tends to shew that the words "final judgment" are used in their strict technical sense. And when the Legislature enacts that a particular act or default shall be an act of bankruptcy, I think we ought not to give to their words any but their strictly proper meaning, unless we are clearly satisfied that it was the intention of the Legislature to use the words in a larger sense.

Bowen, L.J. I am of the same opinion. I think that a garnishee order absolute is not a "final judgment." There is an inherent distinction between "orders" and "judgments." It is true that certain Acts of Parliament have given to "orders" the effect of "judgments," but the distinction between them remains. The words "final judgment" having, then, a proper professional meaning, when they are found in a section of an Act of Parliament which is defining acts of bankruptcy, they should be construed as strictly as if they occurred in a section which was defining a misdemeanor, because the commission of an act of bankruptcy entails disabilities on the person who commits it. Is there then anything in sub-s. 1 (g) to shew that the Legislature meant to use the words "final judgment" in any wider sense? On the contrary, everything, I think, tends to shew that they intended to use the term in its ordinary technical sense.

Fry, L.J. I am of the same opinion.

Solicitor for appellant: *Benn Davis.*
Solicitor for respondent: *Thomas Ingle.*

W. L. C.

BURLINSON *v.* HALL.

1884

March 3.

Assignment of Debt—Mortgage—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

A deed by which debts were assigned to the plaintiff upon trust that he should receive them and out of them pay himself a sum due to him from the assignor, and pay the surplus to the assignor:—

Held, an "absolute assignment (not purporting to be by way of charge only)" within the Judicature Act, 1873, s. 25, subs. 6, and that the plaintiff might sue in his own name for the debts.

THE plaintiff brought an action in his own name only, and claimed certain sums for work done as an auctioneer, and also 109*l.* 2*s.* 9*d.* as assignee of a debt described in the particulars as due from the defendant to John Tucker for work done and moneys expended by the said John Tucker as town agent for the defendant, who was a solicitor, which debt was by an indenture dated the 27th of February, 1883, and made between the said John Tucker of the one part and the plaintiff of the other part, assigned to the plaintiff, and notice of such assignment was duly given to the defendant before action.

By the Statement of Defence, par. 7, as regarded the sum claimed by the plaintiff as assignee of John Tucker, the defendant denied that the plaintiff had any right or title to sue for or recover such sum, and, par. 8, alleged that it appeared upon the face of the statement of claim that the plaintiff had no title to sue for or recover such sum.

An order was made by a master at chambers that the question of the sufficiency of the title of the plaintiff raised in pars. 7 and 8 of the defence be set down for argument and disposed of before proceeding to the trial of the cause.

At the hearing of the argument the indenture referred to in the claim was produced. By the indenture, after reciting that Tucker was indebted to Burlinson in the sum of 152*l.* 8*s.* 3*d.*, Tucker, a solicitor, assigned to the plaintiff Burlinson the debts in the schedule thereunder written, and all other debts due to Tucker from the several persons therein mentioned, and all the right and interest, claim and demand whatsoever of Tucker to

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and in the same debts, to have, receive, and take the debts upon trust that Burlinson should receive the same, and out of the same pay, in the first place, the expenses attending the obtaining payment thereof, and, in the next place, pay and retain to himself the said sum of 152*l.* 8*s.* 3*d.*, with interest for the same at 5*l.* per cent. per annum from the date of the indenture, or so much thereof (if any) as then remained due, and should pay the surplus (if any) of the same debts and premises to Tucker; and Tucker covenanted to pay the debt of 152*l.* 8*s.* 3*d.*, with interest at 5*l.* per cent. per annum, on the 27th of August, 1883, and that if the said sum should not then be paid, he should and would, by equal half-yearly payments, pay interest on the 152*l.* 8*s.* 3*d.*, or on so much thereof as should for the time being remain owing until the same sum shall be fully paid. And Tucker appointed Burlinson his attorney to sue for the debts and premises assigned. And Tucker covenanted that the debts assigned were owing, and that he would not revoke the power to receive them, and for further assurance.

In the schedule four debts, amounting altogether to 244*l.* 18*s.* 6*d.*, were specified. Amongst them was that due from the defendant to Tucker.

Gainsford Bruce, Q.C. (*Harmsworth* with him), for the plaintiff. The plaintiff was entitled to sue in his own name. The legal right to the debts passed to him by the deed, which is an absolute assignment (not purporting to be by way of charge only) within s. 25, subs. 6, of the Judicature Act, 1873. The assignment is not upon any condition, but is absolute. Even although it may in equity be regarded as a mortgage, it is in no sense a "charge," and does not purport to be so. If the *National Provincial Bank* v. *Harle* (1) is cited for the defendant, it may be distinguished on the ground that the mortgage in that case contained a proviso for reconveyance.

Petheram, Q.C. (*McClymont*, with him), for the defendant. The question is whether an assignment of a debt by way of mortgage is within subs. 6. A debt is a mere personal obligation for which there is no security which may be deposited, and the only mode

(1) 6 Q. B. D. 626.

of charging a debt must be by assignment. No doubt, in *National Provincial Bank* v. *Harle* (1) there was a stipulation for reconveyance which is not in this deed. But, as in equity one who pays off a charge is always entitled to a re-assignment of the security, there is here an implied condition for re-assignment, and so that decision is in point. The words "not purporting to be by way of charge only" would be cut out of subs. 6 if the argument for the plaintiff were to prevail. Even a deed which appears to be an absolute conveyance of land may, in equity, be shewn by parol evidence to be only a mortgage, and this assignment is evidently by way of charge only, as the provision as to the surplus shews.

Gainsford Bruce, Q.C., replied.

DAY, J. The first part of the claim is for money due to the plaintiff in his own original right; the second part is for money due to him—not in his own right but—as assignee of one Tucker, and the plaintiff has taken advantage of what he deems to be the right conferred on him by the Judicature Act, 1873, s. 25, sub-s. 6, of making one action serve for the recovery of both classes of debt. Prior to the Judicature Act he must have brought two actions—one in his own name, the other in the name of Tucker. The Judicature Act was intended to simplify procedure, and diminish the costs of it. It was intended—not in any way to limit but—rather to extend the right of suitors, and it provides that where a person is entitled to debts assigned to him he may sue in his own name instead of—as before the Judicature Act—suing in the name of the assignor and giving him an indemnity. Sect. 25 of the Judicature Act, enables him to sue on an "absolute assignment (not purporting to be by way of charge only)." It is contended that the deed in this case is not an absolute assignment, and is by way of charge only. I differ from that contention on both points. I think this is an "absolute assignment." It is said that it is an assignment of a security for payment of the debt, and that the moment that purpose is answered the surplus will belong to the assignee. But still the assignment is, in terms, absolute.

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Not indeed absolute as a sale, but absolute as contradistinguished from conditional, an assignment giving a title there and then. This deed does so. True, if the debt due from the assignor were paid off, the assignor might be entitled to have the subject-matter of the assignment re-assigned to him. But the right of the assignee to whom it is assigned is absolute. No person can control him in dealing as he thinks fit with that which was assigned to him. Then it is said that the assignment purports to be "by way of charge only." It is said that it is a "charge." I do not agree. A charge differs altogether from a mortgage. By a charge the title is not transferred, but the person creating the charge merely says that out of a particular fund he will discharge a particular debt. But a charge differs from an assignment. A charge on a debt confers rights on the person to whom the charge is given to have it enforced by assignment—not by action against the debtor, but by proceedings against the person who created the charge to assign the debt. I think that this instrument is "not purporting to be by way of charge only," but that it purports to be an absolute assignment of the debt. I am satisfied that it comes within s. 25, sub-s. 6, of the Judicature Act.

Mr. Petheram suggests inconveniences which might arise. I fail to appreciate any one of them. Tucker has thought fit to assign this debt and interest to the plaintiff, with the right to recover the debt, and to entrust to him all the power he had. The defendant has no right to complain, and is put in no position of difficulty, and the same sub-s. 6 provides that, if embarrassed or hurt by that process, he may bring in parties. So no injustice is done. The only real difficulty which has been raised is with respect to the case of *National Provincial Bank* v. *Harle*. (1) It would not be becoming in me to make any other observation on that case than this, viz., that it seems to me distinguishable on the ground mentioned by Pollock, B., in the paragraph of his judgment in which he attaches importance to the introduction of a stipulation or covenant for the reconveyance of the mortgaged premises, and it is possible that that was the turning point of that judgment. I have no doubt of the

(1) 6 Q. B. D. 626.

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true construction of the sub-s. 6, and that the plaintiff has a right to sue, as he has done.

A. L. SMITH, J. After some hesitation in this case I arrive at the conclusion that the plaintiff is entitled to judgment. My main difficulty is to distinguish the case from *National Provincial Bank* v. *Harle* (1), although, no doubt, Pollock, B., does say at the end of his judgment that the proviso for reconveyance sufficiently indicates upon the face of the assignment that it purports to be by way of charge only. But I cannot say that makes a satisfactory distinction between that case and the present one. Before the Judicature Act, Burlinson could have sued at law in the name of Tucker. If that course had been taken, Hall could have disputed that 109*l.* 2*s.* 9*d.* was due from him to Tucker. Such being the position of the parties before the Judicature Act, by the Act of 1873, s. 25, sub-s. 6, it is provided that any absolute assignment (not purporting to be by way of charge only), of any debt . . . . of which express notice in writing shall have been given to the debtor . . . . shall be and be deemed to have been effectual in law . . . . to pass and transfer a legal right to such debt . . . . and all legal and other remedies for the same, and it is provided always that if the debtor shall have had notice that such assignment is disputed by the assignor, or any one claiming under him, or of any other opposing or conflicting claim to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead . . . . or may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees. Therefore, as a matter of convenience, Hall is in no worse position now when Burlinson sues in his own name than he, Hall, would have been in if there had been proceedings in the name of Tucker. Tucker would manifestly have been bound by them, for he has assigned the debt, and he is beyond question bound. That being so, and there being no inconvenience in allowing Burlinson to sue, but great convenience in saving two actions, it is said that it is not an absolute assignment here, because there is a resulting trust, and that when Burlinson is

(1) 6 Q. B. D. 626.

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paid his 152*l.* with interest out of the debts assigned, he will hold the surplus as trustee for Tucker. True, but that does not make it the less an absolute assignment. Is it an absolute assignment? If so, the first point is disposed of. It is said the assignment is "by way of charge only." The answer is that it is not by way of charge at all. I agree with what my Brother Day has said on that point. Then as it is an absolute assignment, not purporting to be by way of charge only, Burlinson is entitled, under s. 25, sub-s. 6, to maintain the action.

Judgment for the plaintiff.

Solicitors for plaintiff: *Miller & Miller.*
Solicitor for defendant: *Richard Davies.*

J. R.

March 17.

MEAKIN, APPELLANT; MORRIS, RESPONDENT.

Infant—Apprenticeship Deed—Contract not for Benefit of Infant—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *ss.* 5, 6.

An infant was apprenticed by a deed containing a provision that the master should not be liable to pay wages to the apprentice so long as his business should be interrupted or impeded by or in consequence of any turn-out, and that the apprentice might during any such turn-out employ himself in any other manner or with any other person for his own benefit:—

Held, that, this provision not being for the benefit of the infant, the apprenticeship deed could not be enforced against the infant under the Employers and Workmen Act, 1875, ss. 5, 6.

CASE stated by a stipendiary magistrate under 20 & 21 Vict. c. 43, the facts of which were in substance as follows:—

The appellant was a manufacturer of earthenware at Tunstall, in Staffordshire. The respondent, who was an infant apprenticed to the appellant to learn the art of a hollow-ware presser, having absented himself from his work, the appellant had applied to the magistrate under 38 & 39 Vict. c. 90, for an order against the respondent directing him to perform his duties under the apprenticeship deed.

By the apprenticeship deed the respondent bound himself to serve the appellant as an apprentice for the term of three years and three months, and the master thereby covenanted during

the term to teach the apprentice, to find him fair and reasonable work, and to pay him for his work and services such wages as thereinafter mentioned, viz., two-thirds of the amount as paid to journeymen at the same time for work of the like description. It was further provided by the deed that the apprentice should not during the said term become, or be a party to, or concerned or concurring in any agreement or proceeding commonly called or resembling a turn-out by or between any journeymen or other workmen, and in case there should be any turn-out and the said apprentice should be concerned in or encourage the same, or otherwise not obey the reasonable commands of his master, then the said master should be at liberty to put an end to and determine the apprenticeship; and further, that the said master should not be liable or called upon to pay any wages to the said apprentice so long as his business should or might be interrupted or impeded by or in consequence of any turn-out, and the said apprentice was thereby expressly authorized and allowed during any such turn-out to employ himself in any other manner or with any other person for his own benefit.

It was proved that, at the time when the respondent absented himself from his work, there was a turn-out, or strike, by the journeymen hollow-ware pressers employed by the appellant; but the appellant's witnesses stated that there was plenty of work for the apprentices to do during such turn-out, and that there was nothing to prevent the respondent from earning the same wages he had done up to the time of his absenting himself from the manufactory, and that the apprentice would have no difficulty except in the case of a general turn-out in getting temporary employment with any other manufacturer.

It was contended for the respondent that the apprenticeship deed was void on the ground that the stipulations therein contained were unfair and inequitable as against an infant. The magistrate was of opinion that the deed was void, and accordingly refused to make the order prayed for. The question was whether his decision was correct.

Rose (*Harvey*, with him), for the appellant. The stipulation that the master may stop the work and wages during a strike or

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turn-out, leaving the apprentice free to get work elsewhere while the strike lasts, is only reasonable, and cannot be considered as prejudicial to the infant so as to avoid the contract. In *Reg.* v. *Lord* (1) the agreement was of a wholly different character, for while it bound the infant to serve during the whole term, it practically enabled the employer to stop his works and the wages of the infant when he pleased. This case is within the authority of *Leslie* v. *Fitzpatrick.* (2) The whole of the contract must be looked at, and if as a whole it appears to be beneficial to the infant such a stipulation as this will not invalidate it. If the stipulation is such as having regard to the circumstances of the particular trade the master is reasonably justified in imposing it as a protection to himself, it will be for the benefit of both parties that such a contract can be made. [He also cited *Cooper* v. *Simmons.* (3)]

H. Nash, for the respondent, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that the decision of the magistrate in this case was correct. The principle upon which this case must be determined is, as I understand it, simple enough. It is true in one sense that the whole of the contract must be looked at to determine the effect of the particular stipulation in question; but, if on so construing such stipulation, it appears that it must if enforced necessarily be to the disadvantage and cannot be to the advantage of the infant, it will invalidate the contract. The contention for the appellant may be tested by reference to the well-settled rule with regard to contracts imposing penalties on infants. If the contention is correct, the stipulation for such a penalty might not invalidate the contract, for the contract as a whole might be so advantageous to the infant that the imposition of a trifling penalty would not prevent the contract from being as a whole for the benefit of the infant. But it is clear that such a contention would be inconsistent with the authorities on the subject. The law, as it stands, is, as I have always understood it, that you may not make a contract with an infant containing stipulations that cannot be for the benefit but must

(1) 12 Q. B. 757; 17 L. J. (M.C.) 181. (2) 3 Q. B. D. 229.
(3) 7 H. & N. 707; 31 L. J. (M.C.) 138.

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be to the disadvantage of the infant, as, for instance, a stipulation for a penalty to be paid by the infant. In this case the stipulation is that in the event of a turn-out the master may refuse to find the apprentice work or to pay him wages, giving him only as an equivalent the power of getting work, if he can, elsewhere during the turn-out, a period the uncertainty of which renders it practically impossible for the infant to enter into a satisfactory or advantageous engagement elsewhere, inasmuch as it is provided that when the turn-out is over he must return to the service of the master. By the previous words of the deed the master would be bound, turn-out or no turn-out, to provide the apprentice with work and to pay him wages. Then he stipulates for his own protection that in the case of a turn-out he need not find work or pay wages. It is impossible to say that this stipulation is for the infant's advantage. It seems to me, therefore, that the magistrate decided rightly on general principle.

It also seems to me that his decision is in accordance with authority. In my opinion the case clearly comes within the authority of the decision in *Reg.* v. *Lord* (1), and the principle on which *Leslie* v. *Fitzpatrick* (2) was decided is not applicable. In the latter case the judgment of the Court entirely adopts the decision in *Reg.* v. *Lord* (1), and expressly states that the reservation to the master of the right to stop the work and wages would invalidate the contract. Here the contract contains the very stipulation which in *Leslie* v. *Fitzpatrick* (2) was admitted to be fatal. With regard to the tests laid down in *Leslie* v. *Fitzpatrick* (2) as general tests for determining whether a contract with an infant is valid, I will only say, with the greatest respect for the judges who decided that case, it seems to me that it may be matter of consideration in the future whether they can be accepted as the true tests consistently with the previous authorities. It is however unnecessary to discuss this for the purposes of the present case.

WATKIN WILLIAMS, J. I agree. Possibly it might be desirable that infant apprentices should be able to bind themselves

(1) 12 Q. B. 757; 17 L. J. (M.C.) 181. (2) 3 Q. B. D. 229.

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by stipulations such as those contained in this apprenticeship deed; but in my opinion this can only be effected by fresh legislation. As the law now stands it seems to me well settled upon the authorities that such a contract is void.

Decision affirmed.

Solicitor for appellant: *Tyrrell, for Llewellyn & Ackrill.*
Solicitor for respondent: *A. B. D. Sword.*

E. L.

March 17.

[IN THE COURT OF APPEAL.]

BELT *v.* LAWES.

Practice—New Trial—Damages excessive—Power of Court to reduce Damages.

In a case where the plaintiff is entitled to substantial damages, and a verdict for the plaintiff cannot be impeached except on the ground that the damages are excessive, the Court has power to refuse a new trial, on the plaintiff alone, and without the defendant, consenting to the damages being reduced to such an amount as the Court would consider not excessive had they been given by the jury.

THIS was an action for libel in which, at the trial before Huddleston, B., at Westminster, in 1882, the jury found a verdict for the plaintiff, damages 5000*l.* The defendant afterwards applied for a new trial on the ground that the verdict was against the weight of evidence, and that the damages were excessive. The majority of the Queen's Bench Division (Denman and Manisty, JJ., Lord Coleridge, C.J., dissenting) refused a new trial on the plaintiff consenting to the damages being reduced to 500*l.*

The defendant appealed.

C. Russell, Q.C. (*Webster, Q.C.*, and *Coward*, with him), for the defendant, took the preliminary objection that the Divisional Court had no power to reduce the damages without the consent of both parties, and that the verdict as given being in the opinion of that Court wrong, the result inevitably must be a new trial. On this point they cited the following: *Price* v. *Severn* (1), where Alderson, J., said, "But nothing is more usual

(1) 7 Bing. 320.

than in cases of assault where an excessive verdict has been given, to suggest to the counsel to agree on a sum, to prevent the necessity of a new trial;" *Leeson* v. *Smith* (1), where Lord Denman, C.J., said, "we cannot however reduce the damages without the consent of both parties, and therefore the rule must be made absolute for a new trial;" and *Hilton* v. *Fowler* (2), where Alderson, B., said, "I do not see what authority the Court has to alter the damages." The case of *Phillips* v. *London and South Western Ry. Co.* (3) was cited to shew that where the Court thought the damages too small they only granted a new trial; whereas if they had power to reduce, they would have had power also to increase the damages without the consent of both parties.

Sir H. Giffard, Q.C. (*Pollard*, with him), for the plaintiff, stated that the consent of the plaintiff to the reduction of damages had been given only on the supposition that the defendant would also consent, but that, as the defendant did not consent, the plaintiff was prepared to contend that the verdict for the damages given by the jury was right. [Thereupon the case was argued by the counsel on both sides on the merits.]

Cur. adv. vult.

BRETT, M.R. The first point in this case is a pure point of law, namely, whether the judgment of the majority of the Divisional Court can in law stand as it is, if the verdict cannot otherwise be impeached, it being founded on the consent of the plaintiff alone that the amount of the damages should be reduced from 5000*l.* to 500*l.* In my opinion such judgment can stand. Where the complaint is only that the damages are excessive, and the verdict cannot be otherwise impeached, and it is a case where the plaintiff is entitled to substantial damages, the Court has power to refuse a new trial without the consent of the defendant, on the plaintiff's consenting to the amount of the damages being reduced to such an amount as, if it had been given by the jury, the Court would not have considered excessive. It has been argued that this cannot be the right rule, because it is said that if the damages are excessive the Court must come to the conclusion

(1) 4 Nev. & M. 306. (2) 5 Dowl. 312.
(3) 4 Q. B. D. 407; 5 Q. B. D. 78.

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that the verdict is wrong, and the inevitable result of that must be a new trial. But the Court is asked to exercise its discretionary power, and to say that the jury have given larger damages than they ought to have given. The Court does not give damages, but it only says that if the jury had given a sum which was a part of what they had given, the Court would not have been dissatisfied, but more than that, as the power of the Court is discretionary, it seems to me it is competent to the Court to exercise such power in any way which is not unjust. Mr. Russell said then that if the Court could reduce the damages without the consent of both parties, they could increase them also without such consent, which he said would be an absurd conclusion, because then the Court would in that case be giving damages which a jury had not given. I am, however, by no means prepared to say that the Court might not refuse a new trial if a defendant would agree that the damages should be larger. Suppose a case in which a new trial should be moved for on behalf of the plaintiff, on the ground that the amount of damages which the jury had given was obviously unreasonably too small, I am far from saying that the Court would not have power in favour of the defendant, and in his interest, to say that the damages given are too small, but that if the defendant will agree to their being increased to such a sum as may be stated, a new trial shall be refused. But, however that may be, I have not the least doubt that where, as in the present case, the jury have given damages which are challenged only as being too large, the Court has power to say that if the jury had given less, as 500*l.* and not 5000*l.*, the Court would have considered such damages not excessive, and therefore to say if the plaintiff will consent to the verdict being for that amount, the defendant will really have no grievance. I see nothing in principle against reducing the damages under such circumstances, and it has certainly for years been the invariable practice of the Courts to do so. Mr. Russell said it had never before been challenged, but I see nothing in principle contrary to it, and therefore if there were nothing further which could be urged, the verdict would stand for the plaintiff for 500*l.*, but the judgment of the Divisional Court has been challenged by both parties, by the defendant on the ground that the verdict was against the weight of evidence,

and by the plaintiff on the ground that the damages were not excessive, and that they should therefore not have been reduced. [His Lordship then examined and commented upon the evidence at the trial, and in the result came to the conclusion that the verdict ought to stand for the plaintiff, and for the original amount of damages which the jury gave, viz. 5000*l.*]

BAGGALLAY, L.J. As regards the preliminary point raised by Mr. Russell, I entirely agree with what has been said by the Master of the Rolls. I am of opinion that it is within the power of the Court with the assent of the plaintiff to reduce the amount of damages, if of opinion that the verdict, though otherwise proper, had assessed the damages at too high an amount. [The other part of the judgment is omitted as unnecessary to the point reported.]

LINDLEY, L.J. The first question raised in this case was whether the Divisional Court had power to discharge the rule for a new trial, if the plaintiff would consent to reduce the damages awarded to him by the jury. I am of opinion that the Court had power to do this, and I believe that the power has constantly been exercised and never questioned. As soon as the Court has decided that a verdict for a plaintiff for more than nominal damages is right, the amount to which the damages given by a jury are to be reduced is a matter which concerns the plaintiff alone; and if he is content to accept a sum suggested by the Court, it appears to me that the defendant has no ground of complaint. The authorities cited to shew that the defendant's consent is also necessary do not appear to me to be in point. In fixing the damages, instead of directing a new trial, the Court does not usurp the province of a jury so much as when it sets aside a verdict and directs a new trial, which the Court always has power to do upon proper grounds. [The learned judge then passed on in the judgment to the merits of the appeal.]

Defendant's appeal dismissed and the rule nisi for a new trial simply discharged.

Solicitor for plaintiff: *C. O. Humphreys.*
Solicitors for defendant: *Lewis & Lewis.*

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March 21.

SOMERSET, Appellant; HART, Respondent.

Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 17—*Suffering Gaming on Licensed Premises—Knowledge of Servant—Mens rea.*

Where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person employed on the premises, but there was no evidence to shew any connivance or wilful blindness on the part of the licensed person, and it did not appear that the servant was in charge of the premises :—

Held, that the justices were right in refusing to convict the licensed person of suffering gaming on the premises under the Licensing Act, 1872, s. 17.

Mullins v. *Collins* (Law Rep. 9 Q. B. 292) discussed.

Case stated by justices under 20 & 21 Vict. c. 43.

The facts, as stated, were in substance as follows :—

At a court of summary jurisdiction held at Chelmsford on the 23rd day of November, 1883, the respondent was charged by the appellant for that he, the respondent, being a licensed person, did suffer gaming to be carried on on his premises at Chelmsford on the 14th day of September, 1883.

It appeared from the evidence before the magistrates that the respondent kept an alehouse which was much frequented on market days by farmers, dealers, hawkers, &c., who were accommodated in several rooms, large numbers of them being supplied with food as well as with drink.

On the day in question, a market day, about three o'clock in the afternoon, the busiest part of the day, a number of persons, stated by the witnesses to be from fifteen to twenty, were in one of the rooms, and they were waited upon and their wants supplied by a man named Arthur Smith, a potman in the service of the respondent, who took the customers' orders and procured from other parts of the premises the food and drink ordered, which he carried into the room. Two men named Swinn and Everitt were there, and they commenced gambling with a mug and three nuts, first for beer and then for money. Another man named Smee was invited to bet 5*s.* to 4*s.* upon the question of the number of nuts under the mug, but he declined to do so. He was then induced to take his watch from his pocket, but would not let it go from his hand. Swinn and Everitt each placed a watch on

the table, and after some shuffling of the mug declared Smee and Everitt had lost their watches, and seized Smee's and forcibly took it from him. He sent for the police, and Swinn and Everitt decamped. They were, however, tried and convicted at the Michaelmas Quarter Sessions for larceny of the watch (which was never recovered), they having obtained it by a trick.

The fact that divers acts of gambling took place was clearly proved by several witnesses, Smith, the potman, passing twice into and out of the room during the time in attending to the wants of the customers, and Smith, who was a witness before the magistrates, acknowledged that although he saw nothing of the gambling for beer and money, yet that he did see the transaction in connection with the watch, and heard a bet made of 5*s.* to 4*s.* before the shuffling of the mug took place upon which Smee and Everitt were declared to have lost their watches. It did not appear that he took any steps to prevent the gaming, although he had knowledge of what was going on.

Evidence was given that the respondent was engaged in the bar and elsewhere attending to his customers whilst the gaming transactions were going on, but there was no evidence that he had any actual knowledge of the gaming, or that the potman ever communicated with him in any way upon the subject, or that he was ever in the room.

None of the facts were disputed on behalf of the respondent, it being admitted that the gaming took place, that Smith was aware of it, that he did nothing to prevent it by reporting what was going on to the respondent or otherwise; but it was contended that, as there was no evidence that the respondent knew or was informed that gambling was going on or had taken place, he could not be convicted. The magistrates allowed the objection, finding no evidence that the respondent had himself willingly shut his eyes to what was going on, and holding that suffering by Smith was not suffering by the respondent, and that knowledge by Smith was not such constructive knowledge by the respondent as would render him liable to a conviction. They therefore dismissed the information. The question for the Court was whether their decision was right.

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Tindal Atkinson, for the appellant. The charge was of suffering gaming on licensed premises under 35 & 36 Vict. c. 94, s. 17. The gaming here took place with the knowledge of the respondent's servant, and that is sufficient to bring the respondent within the section: *Crabtree* v. *Hole*. (1)

[CAVE, J. The decision in that case seems to depend on the fact that the master there had left the house in charge of the servant.]

In *Redgate* v. *Haynes* (2) there was no proof of knowledge on the part of the licensed person, and she was held responsible for the conduct of the hall porter.

[LORD COLERIDGE, C.J. The justices thought there was connivance in that case. How can a man suffer a thing to be done when he does not know of it? It is true that a man may put another in his position so as to represent him for the purpose of knowledge, but there is no evidence of such delegation here. The mere fact that a servant knows a thing cannot be evidence that his master knows it.]

It is contended that the knowledge of the servant is constructively the knowledge of the master. The master is responsible for not preventing gaming on the premises: *Mullins* v. *Collins*. (3) In that case the charge was one of supplying liquor to a constable on duty without the authority of his superior officer, and Blackburn, J., in giving judgment, said, "If we hold that there must be a personal knowledge in the licensed person, we should make the enactment of no effect."

No counsel appearing for the respondent,

J. Ogle appeared on behalf of the justices to argue in support of their decision.

The Court did not call on him, but intimated that they would have heard him if necessary.

LORD COLERIDGE, C.J. The only case cited for the appellant which raises any difficulty in my mind is that of *Mullins* v. *Collins* (3), where, however, I observe, the late Mr. Justice Archi-

(1) 43 J. P. 799. (2) 1 Q. B. D. 96.
(3) Law Rep. 9 Q. B. 292.

bald says that he does not intend in any way to interfere with the maxim that before a person can be criminally convicted he must be shewn to have a mens rea. But the true effect of that case may, I think, be summed up by saying that there the judgment was in affirmance of a conviction. The justices had heard the whole case, and had had the witnesses before them; and they had come to the conclusion on the facts that the appellant had been guilty of an offence. It may be observed that it is stated in the case that the appellant called no witnesses, but relied entirely on certain points of law, and it may be that the justices thought under the circumstances of that case that, as the appellant would not raise any affirmative case on his own behalf, he had none to raise, and the merits were in truth against him, and that they were therefore justified in convicting him of the charge. It may be observed, further, that the liquor was served by a woman, as to whom there was, it would appear, some doubt whether she was not the appellant's wife, and, if the magistrates thought she was his wife, and entrusted by him with the management of the house, the case would be brought within the principle of the other cases that have been cited. The case is therefore open to the observations that it is the only one that can possibly be considered as going the length contended for by the appellant's counsel, that there it was a question as to the affirmance of a conviction, and that the appellant had abstained from giving any exculpatory evidence. It seems to me that these considerations really diminish very much its weight as an authority for the proposition that the magistrates would have been wrong under such circumstances in refusing to convict, and that this Court ought, if they had so refused, to have sent back the case to them with the opinion of the Court that they ought to convict, for that is what we are asked to do here. Here the magistrates find that there was no evidence that the respondent had any actual knowledge of the gaming, or that the potman ever communicated with him on the subject, or that the respondent had himself wilfully shut his eyes to what was going on. They appear to acquit him of all moral guilt whatever, and, that being so, it is pressed upon them that they are bound to convict him of suffering gaming to take place. They refused to do so, and, in my opinion, they were

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right in so refusing. The other cases that were cited give me no difficulty, for, as it appears to me, in all of them the judges expressly say that there must be something from which connivance on the part of the licensed victualler may be inferred, at all events to necessitate a conviction. It is nowhere held in those cases that he can be said to suffer gaming where what takes place is not within his knowledge, but merely within that of one of his servants, and there is no connivance on his part. I quite agree that the provisions of an Act which is passed in the interests of public morality and order should receive a reasonably liberal construction. I do not say that proof of actual knowledge on the part of the landlord is necessary. Slight evidence might be sufficient to satisfy the magistrates that the landlord might have known what was taking place if he had pleased, but where no actual knowledge is shewn there must, as it seems to me, be something to shew either that the gaming took place with the knowledge of some person clothed with the landlord's authority, or that there was something like connivance on his part, that he might have known but purposely abstained from knowing. The magistrates here have acquitted the respondent of any such connivance or wilful blindness. For these reasons I think that their decision must be affirmed.

CAVE, J., concurred.

Decision affirmed.

Solicitor for appellant: *Gibson.*
Solicitors for justices: *Duffield & Bruty.*

E. L.

DRUITT, APPELLANT; OVERSEERS OF CHRISTCHURCH, RESPONDENTS. 1883 Nov. 26.

Parliament—County Vote—Rent-charge for Life or Lives below value of 5l.—Occupation—Reform Act, 1832 (2 *Wm.* 4, *c.* 45), *ss.* 18, 26.

By s. 18 of the Reform Act, 1832, no person shall be entitled to a county vote in respect of any freehold lands or tenements of which he may be seised for a life or lives, except he shall be "in the actual and bonâ fide occupation of such lands or tenements," or except the same shall be of the clear yearly value of not less than 10*l.* (reduced to 5*l.* by a subsequent Act):—

Held, that a rent-charge for life below the yearly value of 5*l.*, being incapable of occupation, was not within the exception in s. 18, and therefore did not confer a county vote.

CASE stated by the revising barrister for the southern division of the county of Southampton.

The material facts were these:—

In the parish of Christchurch, Arthur W. Lane and Ernest L. Lane claimed the county franchise in respect of freehold rent-charges.

Each of the claimants was entitled to a yearly rent-charge of 2*l.* charged upon a freehold messuage in Christchurch during the life of Elias Lane, the grantor of the rent-charges, by two several deeds dated the 1st of December, 1881.

The appellant objected that the claimants were seised of an estate for lives of rent-charges under the yearly value of 5*l.*; that such rent-charges were incapable of actual and bonâ fide occupation; and that the claimants therefore came within the disability created by 2 Wm. 4, c. 45, s. 18.

The revising barrister held that the right to the rent-charge, and the payment thereof before the 1st day of January, 1883, constituted an occupation of the rent-charge sufficient to entitle the claimants to the franchise within ss. 18 and 26 of 2 Wm. 4, c. 45, and decided to retain the names on the register.

Bosanquet, Q.C., for the appellant. There can be no occupation of a rent-charge, and the rent-charges in the present case being below the value of 5*l.*, s. 18 of the Reform Act, 1832, as amended

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by s. 5 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), applies to disqualify the holders. By 8 Hen. 6, c. 7, the franchise was given to all who "shall have free land or tenement" of the clear annual value of 40*s.*, and a rent-charge has been held to be a "tenement" within the meaning of the Act. Sect. 18 of the Reform Act, 1832, has limited this right. The effect of ss. 18 and 26 (1) is that if the hereditament on which the right to vote depends is under 5*l.* in value it must be capable of occupation in order to confer a vote; but if it is over the value of 5*l.* possession is sufficient. This view was assumed to be correct in *Bearn* v. *Watson* (2), though the point here was not argued. [He also cited *Warburton* v. *Overseers of Denton*. (3)]

B. Coleridge, for the respondents. Sect. 18 of the Reform Act, 1832, refers only to corporeal tenements capable of actual occupation. The case of a rent-charge comes within s. 26; actual possession, as distinguished from mere legal possession, is sufficient, and actual receipt of the rent-charge constitutes actual possession: *Murray* v. *Thorniley*. (4) In *Warburton* v. *Overseers of Denton* (3) the words "lands or tenements of freehold," which occur twice in s. 5 of the Representation of the People Act, 1867, were held to apply, as used in the latter part of the section, only to corporeal hereditaments. Their meaning must be the same in the earlier part by which the qualifying value under the Reform Act, 1832, s. 18, is reduced from 10*l.* to 5*l.* [He also cited *Dodds* v. *Thompson*. (5)]

LORD COLERIDGE, C.J. In this case we have for the first time to put an interpretation upon s. 18 of the Reform Act, 1832, as amended by the Representation of the People Act, 1867, s. 5, which alters the yearly value of the lands and tenements from 10*l.* to 5*l.* The question is, whether a rent-charge for the life of another, in order to confer the county franchise, must not be of

(1) By s. 26 no person shall be registered as entitled to a county vote in any year in respect of his estate or interest in any lands or tenements as a freeholder, &c., "unless he shall have been in the actual possession thereof, or in the receipt of the rents thereof," for his own use for a specified period.

(2) 1 Colt. Reg. Cas. 268.

(3) Law Rep. 6 C. P. 267.

(4) 2 C. B. 217.

(5) Law Rep. 1 C. P. 133.

the clear annual value of 5*l.* at the least. I have come to the conclusion that it must, and therefore that the decision of the revising barrister was incorrect. The old statute of Henry VI. limited the franchise to persons who "shall have free land or tenement of the clear annual value of 40*s.*" and those words have been held to include possession of a rent-charge issuing out of lands. The rent-charge has been held to be a "tenement," possession of which is sufficient to create a right to the franchise. Now there is nothing in s. 18 of the Reform Act, 1832, to alter the statute of Henry VI. with respect to rent-charges in fee: the old 40*s.* franchise remains untouched; but s. 18 enacts that for the future no person shall be entitled to the county franchise in respect of any freehold lands or tenements, whereof he may be seised for his own life or for the life of another, "except such person shall be in the actual and bonâ fide occupation of such lands or tenements, or except the same shall be of the clear yearly value of not less than 10*l.*," reduced, as I have said, to 5*l.* by the subsequent statute. There must, therefore, with respect not merely to rent-charges but to any freehold lands or tenements, be either a clear yearly value of 5*l.* at least, or an actual occupation. The object the legislature had in view was to place some limitation upon the creation of faggot votes by means of rent-charges. The matter is not without authority. In *Bearn* v. *Watson* (1), though the actual point here was not argued, yet the Court did in fact determine it, because the rent-charge in question being one for life, and being, when apportioned between the two counties in which the lands were, admittedly below the value of 5*l.* and above 40*s.* in the county in which the vote was claimed, they decided that the value in that county was not sufficient, and therefore disallowed the vote. I think that in effect *Bearn* v. *Watson* (1) governs this case. The cases cited by the counsel for the respondents were not in point. In *Murray* v. *Thorniley* (2) the decision was upon s. 26, where the word used is "possession" and not "occupation." The section confines the right to vote in respect of an estate or interest in lands or tenements to cases in which a person shall have been in the actual

(1) 1 Colt. Reg. Cas. 268. (2) 2 C. B. 217.

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possession thereof, or in the receipt of the rents and profits thereof, for his own use for the period specified by the section; and the Court held that there must be not only seisin in law of a rent-charge, but also actual receipt of it. The case of *Warburton* v. *Overseers of Denton* (1) is open to the same observation; it was a decision upon a different statute, and does not apply to the present case. Sects. 18 and 26 may well be read together, and their effect is this: In all cases of freehold lands and tenements (including rent-charges) there must be actual possession: In all cases of freehold lands and tenements for life below the value of 5*l.* there must be occupation, and if the tenement is not capable of occupation (and a rent-charge is not) there can be no vote in respect of it. I am therefore of opinion that the decision of the revising barrister should be reversed.

HAWKINS, J. I entirely agree with the judgment of my Lord, and the reasons he has given.

MATHEW, J. I am of the same opinion, and for the same reasons.

Judgment reversed.

Solicitors for appellant: *Lovell, Son, & Pitfield.*
Solicitors for respondents: *Robins & Son, Southampton.*

(1) Law Rep. 6 C. P. 267.

W. A.

LOWCOCK, APPELLANT; THE OVERSEERS OF BROUGHTON, RESPONDENTS. 1883 *Nov.* 26.

Parliament—County Vote—Rent-charge—Actual Possession under 2 *Wm.* 4, *c.* 45, *s.* 26—*Statute of Uses*, 27 *Hen.* 8, *c.* 10.

A. being possessed of a rent-charge issuing out of freehold lands, granted it unto B., C., and D., and their heirs, to hold the same unto B., C., and D., and their heirs, to the use of A., B., C., and D., their heirs and assigns for ever, in equal one-fourth shares as tenants in common:—

Held, that all the grantees took under the Statute of Uses, and that by force of the statute and on the authority of *Heelis* v. *Blain* (18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88), they were from the date of the deed in actual possession of their shares of the rent-charge within s. 26 of 2 Wm. 4, c. 45.

AT a court held for the revision of the list of voters for the township of Broughton in the southern division of the county of Lancaster, objection was made to the claim of the appellant to be inserted on the list of voters for the township in respect of "one equal fourth share of freehold rent-charges."

The rent-charges, three in number, were created by one John Lowcock, two for 11*l.* 6*s.* and 7*l.* 7*s.* 1*d.*, in 1865, and one for 22*l.*, in 1875. The conveyances were similar; that of 1875 conveyed land to the purchaser and his heirs to the use that the vendor, John Lowcock, his heirs and assigns, should for ever thereafter out of the plot of land thereby assured and the buildings for the time being erected thereon have, receive, and take a clear yearly rent of 22*l.* by equal half-yearly payments on every 25th of March and 29th of September, and to further uses limiting to the said John Lowcock his heirs and assigns powers of distress and of entry and perception of rents and profits for securing the yearly rent, and subject and charged as aforesaid to the use of the purchaser, his heirs and assigns for ever.

By indenture duly executed by all parties thereto, dated the 11th of January, 1883, and made between the said John Lowcock of the first part, Richard Lowcock, the appellant, Arthur Lowcock and Frederick William Lowcock (sons of John Lowcock) of the second part, and John Lowcock, Richard Lowcock, Arthur Lowcock, and Frederick William Lowcock of the third

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part, John Lowcock, in consideration of the natural love and affection which he had for his sons, granted and conveyed unto Richard Lowcock, Arthur Lowcock, and Frederick William Lowcock and their heirs, all those three several yearly rents of 11*l.* 6*s.*, 7*l.* 7*s.* 1*d.*, and 22*l.*, To hold the same unto Richard Lowcock, Arthur Lowcock, and Frederick William Lowcock and their heirs, to the use of John Lowcock, Richard Lowcock, Arthur Lowcock, and Frederick William Lowcock, their heirs and assigns for ever, in equal one-fourth shares as tenants in common.

The half-yearly rents which became due on the 25th of March, 1883, being the first payable after the execution of the indenture of the 11th of January, 1883, were paid in the month of April to John Lowcock, but no portion of the same was paid to the appellant. It was objected that the appellant had not been in actual possession of his share of the rent-charges or in receipt of the rents and profits thereof, for the qualifying period under s. 26 of the Reform Act, 1832.

The appellant contended that the Statute of Uses, 27 Hen. 8, c. 10, operated to give to him the actual possession of the rent-charges on the execution of the deed of the 11th of January, 1883.

The revising barrister was of opinion that the deed operated as a reservation by the grantor of one-fourth of the rent-charges for himself, and as a gift of the remaining three-fourths to his three sons in equal one-fourth shares as tenants in common, and that as there was no third party intervening between them and the grantor, the appellant took his one-fourth shares by force of the Common Law, and the Statute of Uses did not apply, and he therefore disallowed the claim.

Ambrose, Q.C., for the appellant. The grantor conveyed the estate in fee to his three sons, and if the deed had stopped there the estate would have vested in them, but the use to them and the grantor operates under the Statute of Uses as to all four, for they must take by the same title, and the parties seised and the cestuis que use are not the same persons. Had they been the same, they would have taken by the Common Law: Lord Bacon's Tracts,

352, cited in Burton on Real Property, 7th ed. p. 45; but the addition of the father as one of the cestuis que use causes the statute to operate, and all four take under the statute: Williams on Real Property, 14th ed. p. 198; Burton on Real Property, 7th ed. p. 46; consequently the case comes within the authority of *Heelis* v. *Blain* (1), which has not been affected by *Orme's Case* (2) and *Hadfield's Case.* (3)

No one appeared for the respondents.

LORD COLERIDGE, C.J. In this case I have come to the conclusion that the argument addressed to us by Mr. Ambrose is correct, and that it is borne out by the authorities. It appears that the grantor granted by deed a yearly rent-charge to himself and his three sons as tenants in common, and the question we have to decide is whether the Statute of Uses makes this deed operate as to all the grantees. There is no doubt that but for the grantor being himself a beneficiary, and if only his sons were grantees, the grant would operate by Common Law and not under the statute. The statute deals with the case of a person standing seised of any lands or other hereditaments to the use, confidence, or trust of any other person or persons, and on this we have the high authority of Lord Bacon (4), who says expressly that where the grantor and the cestui que use is one and the same person, he does not take under the statute. In such a case, in order that the grantees might obtain the franchise, it would have been necessary that there should have been either an entry or a receipt of rents and profits by them. If, however, the grant operates by the Statute of Uses, we have the authority of *Heelis* v. *Blain* (5) that entry or receipt of rents or profits is not necessary. This decision has been followed in two subsequent cases, in each of which the Court refused to depart from it, and it is binding on us. Not I mean that we are constitutionally unable to decline to follow a previous decision, but that we certainly should only do so under exceptional circumstances, and if it

(1) 18 C. B. (N.S.) 90.
(2) Law Rep. 8 C. P. 281.
(3) Law Rep. 8 C. P. 306.
(4) Lord Bacon's Tracts, 352; Burton on Real Property, 7th Ed. p. 45.
(5) 18 C. B. (N.S.) 90.

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were made clear beyond all question that the decision could not be supported. What then is the true effect of this conveyance? It occurred to me during the argument that the conveyance might take effect as to the position of the grantees partly under the Common Law and partly under the statute, but it seems clear on authority that this is not so. We have had cited to us a passage from Williams on Real Property (1), and the same point is dealt with by a writer of even higher authority, Burton (2), and in each case it is laid down as a clear conveyancing proposition supported by the practice of conveyancers that if A. is enfeoffed to the use of A. and B., both are in by the Statute of Uses. Since in this case the father would become entitled to his share of the tenancy in common created by the deed under the statute, it seems to be established by authority that the other grantees also take under the statute. If that be the effect of this deed, *Heelis* v. *Blain* (3) applies, and the decision come to by the revising barrister must be reversed, but without costs.

HAWKINS and MATHEW, JJ., concurred.

Judgment for the appellant.

Solicitors for appellant: *Johnson & Wetheralls.*

(1) 14th Ed. p. 198.

(2) Burton on Real Property, 7th Ed. p. 46.

(3) 18 C. B. (N.S.) 90.

A. M.

FREEMAN, APPELLANT; NEWMAN, RESPONDENT. 1883

Parliament—Notice of Objection—Omission of Date—Parliamentary Registration Act, 1843 (6 & 7 *Vict. c.* 18), *s.* 7. *Nov.* 26.

Where a notice of objection to a person on the list of voters for any county is delivered to overseers and is defective under the Parliamentary Registration Act, 1843, s. 7, the defect is not cured by the publication by the overseers, under s. 8, of the name of the person objected to.

The omission of a part of the date from such a notice is a defect which invalidates it, and cannot be amended.

AT a court held for the revision of the list of voters for the township of Alverthorpe-with-Thornes, in the southern division of the West Riding of the county of York, objection was made to the claim of Charles James Ellis to be inserted in the list of voters for the township.

It was proved that a sufficient notice of objection had been given to the claimant, and that the notice of objection given to the overseers of the poor was in the ordinary form, but ended thus:—

"Dated this eighteenth day of August, one thousand eight hundred and eighty .

"Wm. Fitton,

"of Church Street, Mold Green, Huddersfield."

The overseers duly published a list of persons objected to, including therein the name of the claimant. The claimant objected that the notice given to the overseers was insufficient and void in law, inasmuch as the year of our Lord was incorrectly stated therein.

The revising barrister found as a fact that the claimant was not inconvenienced or misled by this alleged defect in the notice of objection.

For the objector it was contended that the notice was sufficient and valid in law, as the date thereof did not shew that such notice was not given before the 20th of August, 1883, and further, that any defect in the notice related to the overseers only, and was waived by their including the claimant in the list of persons objected to published by them.

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The revising barrister held that the notice of objection was insufficient and void in law, and retained the name of the claimant on the list of claims.

It was admitted that if the notice of objection was valid, the name of the claimant should be expunged from the list.

The question for the Court was whether the notice of objection was valid.

Stuart Wortley, for the appellant. This case is distinguishable from *Beenlen* v. *Hockin* (1), because there the notice held to be bad was given to the person objected to, and might have misled him. Here the notice was given to the overseers, and they have published the name of the person objected to. There can be no reason for going behind such publication to see whether the notice was in proper form. In the case of claims publication is conclusive: *Davies* v. *Hopkins* (2); *Leonard* v. *Alloways* (3). *In re Sale* (4), though a decision under another section, is an authority to the same effect. In *Jones* v. *Jones* (5), where the notice of objection served on the overseers was dated the 12th of August, but was signed on the 18th, it was held that this did not vitiate the notice, and Byles, J., treated the 18th as the true date, and said that an amendment should have been made on the ground that the 12th was a misnomer or inaccurate description within s. 101 of the Parliamentary Registration Act, 1843. So here the omission of the "three" did not vitiate the notice.

Mattinson, for the respondent. The revising barrister was right. By s. 40 of the Parliamentary Registration Act, 1843, the objector "shall prove that he gave the notice or notices respectively required by this Act to be given by him." In this case he failed to do so, for s. 7 of the Act declares that a notice according to the form numbered 4 in the schedule A must be given, and that has not been done. *Davies* v. *Hopkins* (2) is no authority that the overseers can waive the compliance with the directions of the statute in the case of objections.

Stuart Wortley, in reply. The words in s. 4, directing how a

(1) 4 C. B. 19.
(2) 3 C. B. (N.S.) 376.
(3) 2 Hop. & C. 411; 48 L. J. (C.P.) 81.
(4) 50 L. J. (C.P.) 113.
(5) Law Rep. 1 C. P. 140.

claim shall be made to the overseers, and those in s. 7, directing how an objection shall be made to them, are equally imperative, and if compliance can be waived in one case it can in the other.

LORD COLERIDGE, C.J. I cannot help regretting the decision I am about to give, because it is on a point highly technical and beside the merits of the case. Still it seems that the powers of amendment have not been extended to this particular case, and although there is the high authority of Mr. Justice Byles for saying that a misdate is a misnomer within s. 101 of the Parliamentary Registration Act, 1843, I must respectfully say I cannot agree. I say this with the greater freedom, because the other judges who decided the case of *Jones* v. *Jones* (1) put their decision on other grounds, not that there was a misnomer, but that the section was substantially complied with. In the present case we have to determine whether this notice, which was given under s. 7 of the Act of 1843, and which is on the face of it insufficient and is possibly misleading, is a bad notice. Parliament has enacted that two notices of objection shall be given, and the voter has a right, before the question of his title to vote can be considered, to have it shewn that the provisions as to these two notices have been complied with. It appears here that in the objection delivered to the overseers one condition imposed by the Act has not been complied with. In the case of *Beenlen* v. *Hockin* (2), Maule, J., with the assent of the other members of the Court, held that a notice in which the date of the year was left a blank was a bad notice, and though it was shewn to have been delivered within the proper time it was held that the revising barristers were wrong in proceeding to consider the objection. I am not aware that the decision in that case has been modified, and it is binding on us. I do not yield to the view that the overseers have the right to waive the delivery to them of a valid notice. If the person objected to chooses to appear and does not take the objection that he himself has received no proper notice of objection, that is a matter for him, but so far as the overseers are concerned they have no right of waiver, and the person objected to has a right to see whether the conditions imposed by the Act

(1) Law Rep. 1 C. P. 140. (2) 4 C. B. 19.

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have been fulfilled, and if they have not to take advantage of that fact to defeat the objection.

The decision of the revising barrister was therefore right, and the appeal must be dismissed.

HAWKINS and MATHEW, JJ., concurred.

Appeal dismissed.

Solicitors for appellant: *Van Sandau, Cumming, & Armitage, for Brook, Freeman, & Batley, Huddersfield.*

Solicitors for respondent: *Singleton & Tattershall, for Newman & Sons, Barnsley.*

A. M.

Nov. 26.

GREENWAY, APPELLANT; BACHELOR, RESPONDENT.
JACOBS' CASE.

Parliament—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 15, *sub-s.* 2; *s.* 28, *sub-s.* 15—*Borough Franchise—Registration of Voters—Lists—Divisions of List—Transfer of Names—Objection to Qualification for One Franchise.*

Sect. 15 of the Parliamentary and Municipal Registration Act, 1878, enacts that where the whole or part of the area of a municipal borough is co-extensive with or included in the area of a parliamentary borough, the lists of parliamentary voters shall, so far as practicable, be made out and revised together; and specifies the mode in which overseers of parishes shall make out the lists. By sub-s. 2, where the parish is situate wholly or partly both in the parliamentary borough and the municipal borough, the lists shall be made out in three divisions: Division I., shall comprise the names of the persons entitled both to be registered as parliamentary voters and to be enrolled as burgesses: Division II., shall comprise the names of the persons entitled to be registered as parliamentary voters, but not to be enrolled as burgesses: Division III., shall comprise the names of the persons entitled to be enrolled as burgesses, but not to be registered as parliamentary voters. By s. 28, sub-s. 15, where a list is made out in divisions the revising barrister shall place the name of any person in the division in which it should appear according to the result of the revision, regard being had to the title of the person to be on the list both as a parliamentary voter and a burgess, or only in one of those capacities, and shall expunge the name from the other division (if any), in which it appears.

An objection in respect only of a voter's qualification for the parliamentary franchise having been taken to the retention of his name in Division I., the revising barrister struck the name off Division I.; and was thereupon asked

to place it in Division 3, but refused so to do unless proof was given of a qualification entitling the voter to be on the burgess roll:—

Held, that the decision of the revising barrister was right, and that he was not bound, under s. 28, sub-s. 15, to place the name in Division 3.

CASE stated on appeal from the decision of the revising barrister for the borough of Plymouth.

The facts were as follows:—

At a Court held for the revision of the lists of voters for the parish of St. Andrew, in the borough of Plymouth, the name of A. Jacobs was duly objected to by the appellant; the form of objection being (so far as is material), as follows:—

"To Mr. Abraham Jacobs.

"I hereby give you notice that I object to your name being retained on (Division I. of) the list No. 1 for the parish of Saint Andrew, of persons entitled to vote at the election of members to serve in parliament for the parliamentary borough of Plymouth, on the following grounds:—

"(1.) That you have not occupied for twelve months to July 15, the qualifying property:

"(2.) That your occupation is not sufficient, or of a nature to create a qualification for the parliamentary franchise:

"(3.) That the premises occupied by you are not of sufficient value:

"(4.) That the premises so occupied do not confer a right to vote:

"(5.) That the nature of your qualification is wrongly described."

It was admitted that Jacobs, who did not appear personally, had no sufficient qualification for the parliamentary franchise, but it was contended that the notice of objection was bad, so far as referred to his qualification as a voter for the municipal election, on the ground that the objection was directed solely against the parliamentary qualification, and that the municipal qualification was not challenged.

The revising barrister held that the objection challenged the voter's right both to the parliamentary and municipal franchise, and also that he (the revising barrister) had power to transfer the

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name of Jacobs, who was properly objected to on Division I., to Division III., which only conferred the municipal qualification on the voter.

The revising barrister was thereupon requested by the appellant to transfer Jacobs' name to Division III., which he consented to do upon having proof of a qualification entitling Jacobs to be registered on Division III.

No such proof was forthcoming, and the revising barrister therefore refused to insert the voter's name on Division III., holding that where a voter had been shewn to be disqualified for one division he was not entitled to be placed upon another until he had proved himself to be qualified to be placed thereon. The revising barrister therefore struck off Jacobs' name from the lists altogether.

The questions for the opinion of the Court were :—

1. Whether the form of objection was sufficient to call in question Jacobs' right to appear upon Division I. as a parliamentary and municipal voter.

2. Whether or not before having his name transferred from Division I. to Division III. Jacobs was bound to prove his qualification.

If the Court should answer either of these questions in the negative, then the names appearing in the schedule annexed to the case were to be placed in Division III. of the list of voters.

R. S. Wright, for the appellant. The revising barrister ought to have placed Jacobs' name in Division III. of the list under s. 28, sub-s. 15, of the Parliamentary and Municipal Registration Act, 1878, without requiring any proof of his qualification for the municipal franchise. The notice of objection followed the form specifically given in the schedule to the Act, Sched. Form I. No. 2 (Parliamentary), in relation to the parliamentary franchise, and was an objection to that franchise only. Form I., No. 4 (Municipal), specifies a different form of objection to the municipal franchise, and the note to Form I. provides that if the list is made out in divisions, the notice of objection shall specify the division to which the objection refers. By s. 8, the schedule and notes are to have the same effect as if enacted in

the body of the Act. No objection having been taken with respect to the municipal franchise, the "result of the revision," within the meaning of sub-s. 15 of s. 28, was that Jacobs was entitled to remain on the burgess list. Down to the date of the revision Divisions I. and III. are the same. Sect. 26 requires that the notice of objection shall state specifically the ground or grounds of objection, and incorporates s. 7 of the County Voters Act, 1865, which provides that no voter is bound to prove his right otherwise than as such right shall be expressly objected to. Where a person is on the list, and his qualification for one franchise is not objected to, the revising barrister has no power to call upon him to prove that qualification, but is bound to place his name in the proper division.

B. Coleridge, for the respondent, was not heard.

LORD COLERIDGE, C.J. The contention made on behalf of the appellant really comes to this, that where it is distinctly proved or admitted that there is a fatal objection to the voter's name being retained in Division I. of the list, which confers both the parliamentary and the municipal franchises, upon an objection being taken with respect to the parliamentary franchise, the revising barrister is bound, ipso facto, to admit his name in Division III. without proof of any qualification entitling him to be placed upon that division. Division III. for certain purposes no doubt does confer the municipal franchise. But a voter who claims a qualification entitling him to one franchise and not the other, to be perfectly safe, should make his claim according to the fact. If he thinks he is entitled to both, but there is a doubt whether he is entitled to the municipal franchise, he should claim to be placed in Divisions I. and II. If the doubt is whether he is entitled to the parliamentary franchise, he should claim to be placed in Divisions I. and III. Here objection was taken to the name being retained in Division I. in the very language of the Act. The grounds stated are admittedly fatal to his right to be in Division I., and he was therefore struck out of that division; and the revising barrister refused to place him in Division III. unless he was able to shew, upon grounds which applied to Division III., that he was entitled to be placed there. I think it

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clear that the revising barrister had a discretion to refuse and exercised it wisely. If the argument on behalf of the appellant were right, a man might obtain a legal right to the municipal franchise, when in fact he possessed no qualification whatever for it. I think the decision of the revising barrister was right and should be affirmed.

HAWKINS, J. I am of the same opinion.

MATHEW, J. I am of the same opinion. S. 28, sub-s. 15 of the Act of 1878 appears to me decisive of the matter. The revising barrister is bound, where a list is made out in divisions, to place the name of any person in the division in which it should appear, and by sub-s. 1 he shall correct any mistake which is proved to him to have been made in any list. An objection fatal to the voter's right to remain in Division I. of the list having been made, the revising barrister said that he was prepared to place him in Division III., if evidence in support of his qualification for the municipal franchise were offered. No such evidence was forthcoming, and it must be assumed that none existed. I think that the revising barrister was not bound to place the voter's name in Division III. merely because the objection to his name being in Division I. was taken with respect to the parliamentary, and not with respect to the municipal franchise.

Judgment for the respondent. Leave to appeal refused.

Solicitors for appellant: *Pattison, Wigg & Co.*

Solicitors for respondent: *J. E. Fox & Co., for R. L. Bachelor, Plymouth.*

W. A.

GREENWAY, APPELLANT; BACHELOR, RESPONDENT.

1883
Nov. 26.

ALDRIDGE'S CASE.

Municipal Corporation — Municipal Franchise — Qualification — Inhabitant Householder—Dwelling-house, Occupation of part of—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 5—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 9, 31.

Occupation of part of a dwelling-house, for the purposes of a private dwelling only, constitutes occupation of a "house" within ss. 9 and 31 of the Municipal Corporations Act, 1882, so as to confer the municipal franchise upon the occupier.

APPEAL from the decision of the revising barrister for the borough of Plymouth.

The material facts were as follows:—

The appellant duly objected to the name of C. Aldridge being retained upon the list of voters for Vintry Ward of the parish of St. Andrew within the borough of Plymouth.

The name appeared on Division I. which confers both the parliamentary and municipal franchise as follows:—

"Aldridge, Charles | 9 Batter Street | dwelling-house | 9 Batter Street."

Aldridge occupied, for the purposes of a private dwelling only, two rooms at No. 9 Batter Street, in which house there were four other residents. The landlord did not live on the premises.

It was contended for the appellant that the rooms so occupied by Aldridge did not constitute a house so as to create a municipal qualification.

The revising barrister held that Aldridge was entitled to the municipal as well as the parliamentary franchise.

The question for the Court was whether Aldridge, occupying only a portion of the house as a private dwelling-house, was such a householder as to be entitled to claim the municipal franchise.

R. S. Wright, for the appellant. Aldridge had no such occupation of part of a "house" within the meaning of the Municipal

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Corporations Act, 1882, as would entitle him to the municipal franchise; there must be a separate occupation for the purpose of some trade, business, or profession. Before the Parliamentary and Municipal Registration Act, 1878, the occupation of a part of a house (not structurally severed) as a dwelling did not suffice either for the parliamentary or for the municipal franchise. Sect. 5 of that Act (1), after providing in effect that separate occupation of part of a house, &c., for the purpose of a trade, business, or profession should suffice for both franchises, proceeded to enact that separate occupation of part as a dwelling should suffice for the parliamentary franchise, but it made no similar enactment as to the municipal franchise. Therefore, before the passing of the Municipal Corporations Act, 1882, the municipal franchise was not acquired by occupation of part of a house as a dwelling. The Act of 1882 contains nothing to alter the law in this respect. It is merely a consolidation Act. Sect. 9 (2) in defining the qualification follows the language of the previous Act

(1) Sect. 5. In and for the purposes of the Reform Act, 1832, and the Municipal Corporation Acts the terms "house, warehouse, counting-house, shop, or other building" shall include any part of a house where that part is separately occupied for the purpose of any trade, business, or profession; and any such part may for the purpose of describing the qualification be described as "office," "chambers," "studio," or by any like term applicable to the case.

In and for the purposes of the Representation of the People Act, 1867, the term "dwelling-house" shall include any part of a house where that part is separately occupied as a dwelling, and the term "lodgings" shall include any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house.

For the purposes of any of the Acts referred to in this section, where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part.

(2) By the Municipal Corporations Act, 1882, s. 9—(1.) A person shall not be deemed a burgess for any purpose of this Act unless he is enrolled as a burgess.

(2.) A person shall not be entitled to be enrolled as a burgess unless he is qualified as follows:—

(*a.*) Is of full age; and

(*b.*) Is on the fifteenth of July in any year, and has been during the whole of the then last preceding twelve months, in occupation, joint or several, of any house, warehouse, counting-house, shop, or other building (in this Act referred to as qualifying property), in the borough; &c.

(32 & 33 Vict. c. 55), and s. 31 (1), which contains the only reference to a part of a house, follows the language of the first part of s. 5 of the Act of 1878, and is similarly expressly limited to parts occupied for the purposes of a trade, business, or profession. Sub-s. (*b.*) of s. 31 does not enlarge sub-s. (*a.*), but only reproduces the last sentence of s. 5 of the Act of 1878.

[LORD COLERIDGE, C.J. Was it not intended to assimilate the two franchises?]

There is nothing to indicate such an intention. The provisions of the Act of 1878 for separate registration of the persons qualified for the one and not for the other franchise are left untouched.

B. Coleridge, for the respondent, was not heard.

LORD COLERIDGE, C.J. I am of opinion that the decision of the revising barrister was right, and should be affirmed. I agree that, if the Act of 1882 had not been passed, there would be much to be said in favour of the view contended for by the appellant's counsel, but to my mind sub-s. (*b.*) of s. 31 of that Act puts the matter beyond reasonable doubt, and deals with the municipal franchise by placing it in an exactly similar position to the parliamentary franchise. It is not questioned that, as the law stood when the Act was passed, and as it was expounded by the Court of Appeal in *Bradley* v. *Baylis* (2), the voter in the present case would be entitled to the parliamentary franchise. I think that sub-s. (*b*) cannot be satisfied by any construction short of this—that the words "any part of a house" were intended

(1) Sect. 31. In and for the purposes of this Act—

(*a.*) The terms house, warehouse, counting-house, shop, or other building include any part of a house, where that part is separately occupied for the purposes of any trade, business, or profession; and any such part may, for the purpose of describing the qualification, be described as office, chambers, studio, or by any like term applicable to the case.

(*b.*) Where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part.

(2) 8 Q. B. D. 195.

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to have the legal meaning already fixed upon them by judicial decision before the passing of the Act. It is as though the legislature had said that whereas judicial decisions had established the position, with respect to the parliamentary franchise, of the occupier of part of a dwelling-house, the principle of those decisions should extend also to the municipal franchise.

HAWKINS, J. I am of the same opinion.

MATHEW, J. I am of the same opinion. I must not be supposed to say that, apart from the Act of 1882, a separate occupation of part of a dwelling-house, separately rateable, would not entitle the occupier to the municipal franchise. The fifth and other sections in the Act of 1878 seem to indicate clearly that it would. But the legislature having thought that a doubt on the matter might occur to critical minds, that doubt was removed by the Act of 1882. I think the decision of the revising barrister was right.

Judgment for the respondent. Leave to appeal refused.

Solicitors for appellant: *Pattison, Wigg, & Co.*

Solicitors for respondent: *J. E. Fox & Co., for R. L. Bachelor, Plymouth.*

W. A.

SHARP *v.* FOWLE.

1884
March 21.

Landlord and Tenant — Distress — Lodger's Goods — Sale of Distress before expiration of Five Days—2 Wm. & M. sess. 1, *c.* 5, *s.* 2—*Lodgers' Goods Protection Act*, 1871 (34 & 35 *Vict. c.* 79), *ss.* 1, 2.

A landlord, having on the 17th of October distrained for rent goods of his tenant's lodger upon the demised premises, sold the same on the 22nd, i.e., before the expiration of five clear days from the distress, contrary to the provisions of 2 Wm. & M. sess. 1, c. 5, s. 2 :—

Held, that an action was maintainable by the lodger against the landlord for so selling his goods.

APPEAL from the decision of the county court judge of Surrey.

The action was for selling the goods of the plaintiff under a distress for rent without five days' notice, contrary to the statute 2 Wm. & M. sess. 1, c. 5, whereby the plaintiff was prevented having the benefit of the Lodgers' Goods Protection Act, 1871, and for wrongfully depriving the plaintiff of the said goods. The facts appeared to be as follows:—The defendant had made a distress for rent due to him in respect of certain premises, and had seized, together with the goods of the tenant, certain goods of the plaintiff, who was a lodger of the tenant's, on the premises. The seizure took place on the 17th of October, 1883, and upon the 22nd the defendant sold the goods. The plaintiff upon the 23rd served upon the defendant a declaration that the goods were his in accordance with the Lodgers' Goods Protection Act, 1871, s. 2. The plaintiff owed no rent to the tenant. It was agreed between the parties that if the defendant was liable the damages were 17*l.* The county court judge gave judgment in favour of the defendant, on the ground that there was no evidence of any special damage.

H. Kisch, for the plaintiff, moved to set aside the judgment of the county court judge, and to enter judgment for the plaintiff for 17*l.* damages. Under 2 Wm. & M. sess. 1, c. 5, s. 2, the landlord is bound to let five clear days elapse between the notice of distress and the sale. The defendant here sold on the fifth day, and

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such sale, therefore, would have been wrongful against the tenant. The Lodgers' Goods Protection Act, 1871, 34 & 35 Vict. c. 79, does not specify any time within which the lodger must serve his declaration; it only provides that after such declaration is served the distress shall not proceed. The question is whether the provision of the Act of William and Mary is not available for the protection of the lodger. It is contended that it is. [He was then stopped by the Court.]

Cannot, for the defendant, shewed cause. The lodger could only be in the same position as the tenant with regard to the infringement of the provision of the statute of William and Mary. It is well established that such an infringement is only an irregularity, and the tenant could only recover in an action on the case the amount of the special damage sustained by reason of the irregularity. Here the declaration of the lodger was too late, for it was not given till the 23rd, which was after the expiration of the five clear days, and after the sale. It cannot be shewn that, if the goods had not been sold until the 23rd, the lodger's declaration would have been served in time to save his goods. Proof of special damage being necessary, he is not proved to have been damnified by the fact that the goods were sold on the 22nd instead of on the 23rd, or that his position would have been any better if they had been sold on the 23rd. The period of five days is given by the statute to enable the tenant to replevy, and has nothing to do with the position of the lodger.

[He cited *Rogers* v. *Parker* (1); *Lucas* v. *Tarleton*. (2)]

LORD COLERIDGE C.J. This case seems to me to be very clear. The contention of the defendant's counsel is very ingenious, but I am of opinion that it does not meet the point raised for the plaintiff. The landlord has by the statute 2 Wm. & M. sess. 1, c. 5, a right to sell goods taken under a distress for rent, but he must comply with the terms imposed by the statute, one of which is that the sale shall not take place till after the lapse of five clear days from the distress and notice thereof. The power of

(1) 18 C. B. 112; 25 L. J. (C.P.) 220.
(2) 3 H. & N. 116; 27 L. J. (Ex.) 246.

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distress and sale applied to the goods of other persons upon the premises, as well as those of the tenant, but in the year 1871 the Lodgers' Goods Protection Act was passed, by which it was provided that, where a lodger's goods are seized under a distress for rent, he may serve on the landlord or his bailiff a declaration in writing stating that the goods are his property, and containing certain other particulars required by the statute; and after the service of such declaration, if the lodger has paid all rent due from him to his immediate landlord, his goods are no longer liable to be made available for the payment of the debt of another person. In this case the landlord sold before the five clear days had expired, and therefore before he could lawfully sell according to statute. It is true that no declaration under the Lodgers' Goods Protection Act was served by the lodger till afterwards, but it seems to me that that is immaterial, and that none the less damage was done to the lodger by the landlord's breach of the law. He had no right to sell the lodger's goods when he did, and the lodger was therefore damaged by such sale. For these reasons I think that the county court judge was wrong, and that his judgment should be reversed, and judgment entered for the plaintiff for the agreed amount.

CAVE, J. I am of the same opinion. The Lodgers' Goods Protection Act, 1871, was passed to provide against great loss and injustice to which, as the preamble says, lodgers were subjected by the exercise of the power of distress given to the landlord by the then existing law. The Act provides that the lodger may serve on the landlord, or his bailiff, a declaration, which requires to be prepared with some care, as, if it be untrue in any material particular to his knowledge, it may subject the lodger to the penalties of a misdemeanor. On the service of such declaration the landlord must abstain from further proceeding with the distress, so far as the lodger's goods are concerned; and, if he does proceed further, justices may order the goods to be restored to the lodger. The provisions of that Act must, as it seems to me, be taken to have been framed with reference to the law as it then stood with regard to the landlord's powers of dealing with

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the goods distrained. Before the statute of William and Mary the landlord had no right to sell the goods. By that Act a right to sell was given to him, subject, however, to certain restrictions imposed for the protection of the tenant, amongst which was the provision which requires the lapse of five clear days before the sale. The Act of 1871 which enables the lodger seeking to take advantage of its provisions to prepare and serve the declaration therein mentioned, must be construed, I think, with reference to that provision.

Here the landlord did sell within the five days. The moment he did so, he interfered with the right which the lodger possessed of serving a declaration under the Act of 1871. It seems to me immaterial when the subsequent declaration was actually served; for, after the sale of the goods, the service of the declaration became an idle ceremony. The landlord, by doing what he was not lawfully entitled to do, deprived the lodger of the right given him by the Lodgers' Goods Protection Act, and the necessary consequence thereof is that the goods are lost to the lodger. I am of opinion, therefore, that the plaintiff was entitled to recover, and that the appeal should be allowed.

Rule absolute to enter judgment for the plaintiff.
Leave to appeal refused.

Solicitor for plaintiff: *H. R. Jones.*
Solicitor for defendant: *Fowle.*

E. L.

LAST (Surveyor of Taxes), Appellant; THE LONDON ASSURANCE CORPORATION, Respondents. 1884 *March* 14.

Income Tax—Insurance Company—Different Branches of Insurance Business carried on by same Company to be taken together as one Business—Additions to Life Fund of Life Insurance Company out of Receipts of the Year—"Annual Profits or Gains"—Premiums not Profits—Sums paid as Bonuses to participating Policy-holders.

An insurance company having one body of shareholders carried on three branches of business, viz., marine, fire, and life insurance business.

The liabilities of the company were discharged partly out of premiums, partly out of income arising from large invested funds, which in the management of the business were allocated to the marine, fire and life branches respectively, and styled the marine, fire, and life funds; but the results of the business in all the branches were thrown together into one account called the "profit and loss account," and dividends were declared out of the balance of this account and not out of the profits of the particular branches:—

Held, that for the purposes of income tax the three branches must be treated as one business and the profits calculated on the results of that business taken as a whole.

Held, also, that additions made to the life fund of the company out of receipts of the year were not subject to income tax as profits.

Life insurance premiums are not in the nature of annual profits, and therefore the "annual profits or gains" of life insurance for the purposes of income tax cannot be arrived at by taking the excess of premiums received during the year over the payments on policies falling due and business expenses during the same period.

A life insurance company issued "participating policies" according to the terms of which any surplus, which existed at the end of each quinquennial period in the hands of the company after payment of policies falling due during such period and provision for outstanding liabilities, was dealt with as follows: two-thirds of the surplus went to the policy holders, who received payment thereof either by way of bonus or abatement of premiums; the remaining third of the surplus went to the company, who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the only profit available for division among the shareholders:—

Held, by Day, J., that the sums payable to the participating policy-holders as above-mentioned did not constitute profits or gains of the company assessable to income tax.

Held, otherwise, by A. L. Smith, J.

Case stated under 37 Vict. c. 16, s. 9, by the Income Tax Commissioners for the city of London, the facts of which were in substance as follows:

The respondents had appealed against an assessment made

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upon them under schedule D of the Income Tax Acts for the year 1879, in the sum of 40,797*l.*, in respect of the profits of their marine and fire branches only, the life branch being entirely disregarded.

The respondents are a corporation incorporated by royal charter, having a common seal, and one body of shareholders, with a paid-up capital of 448,275*l.* Their central office is in London, and they there carry on three branches of business, viz., marine, fire, and life insurance, all managed by the same directorate. The results of the business in the three departments are thrown together into one account called the "profit and loss" account, and dividends are declared out of the balance of this account, and not out of the profits made in the particular departments.

The liabilities of the respondents to policy-holders are discharged partly out of premiums, partly out of income arising from large invested funds, which in the management of their business are allocated to the marine, fire, and life departments respectively, and are hereinafter referred to as the marine, fire, and life funds. The life fund is much the largest of these investments. Income tax is deducted from the greater part of the income arising from these respective funds before payment thereof to the respondents.

As a matter of account the funds are thus divided: (*a*) Paid-up capital, (*b*) General reserve fund, including balance of profit and loss account, (*c*) Marine fund, (*d*) Fire fund, (*e*) Life fund.

The income arising from the interest and dividends on the marine, fire and life funds on an average of the last three years, and from which income tax has been deducted, has been as follows:—

	£	*s.*	*d.*
Marine and Fire	7304	3	10
Life	76,850	12	0
	84,154	15	10

The respondents have therefore paid income tax on 84,154*l.* 15*s.* 10*d.* in respect of these funds.

The profits of the respondents are derived from the following

sources: (1) Interest on paid-up capital and reserve fund, (2) Profit on marine business, (3) Profit of fire business, (4) Profit on life business.

Respecting the profits derived from the interest on the paid-up capital and reserve fund no question arises. They are not included in the return because income tax is levied and paid by deduction from the interest and dividends of the investments of those funds.

As regards the other three sources of profits available for division among the shareholders, the respondents contended that the results of the three branches, marine, fire and life, should be thrown into one general account, and that no distinction should be made between the life branch of its business and the other two, and that, if and in so far as the total sum on which they pay income tax in respect of their investments exceeds the sum total of the profits they make, they are not liable to be assessed under schedule D.; that, in making up the amount of the life profit to be entered in the return for the purposes of income tax, the amount to be so entered must be the profit and no more than the profit available for division among the shareholders, and that the gross profits so arrived at on an average of the last three years have been as follows, viz.:—

	£	s.	d.
Marine	27,635	11	9
Fire	75,766	19	5
Life	27,454	9	5
	130,857	0	7
Deduct expenses	57,597	10	0
	73,259	10	7

The net profits being 73,259*l.* 10*s.* 7*d.*, and the respondents having paid income tax on 84,154*l.* 15*s.* 10*d.* or on 10,895*l.* 5*s.* 3*d.* more than the sums available to them for profits, the respondents maintained that the assessment was wholly wrong and should be discharged.

The appellant on behalf of the Crown contended that life insurance from its peculiar nature does not fall within the scope

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of the Income Tax Acts, except as to the interest from the capital invested in securities; that the profit earned by any life insurance society is derived solely from these investments of capital, and that this is notably so in the case of the respondents; that this interest is either taxed by deduction at its source, or when received in full without such deduction is chargeable as interest on the full amount received under the 4th and 5th cases of schedule D.; that this being so, there is nothing to take into account either in the way of profit or loss in connection with the life branch, beyond the amount of the untaxed interest.

The appellant further urged on behalf of the Crown that, assuming the respondents to be right in their contention that the life branch as well as the marine and fire branches should be brought into the account, the assessable profits of the life branch were not to be determined merely by the amount of profit available for division among the shareholders, but would require to be found according to the third rule of the first case of schedule D.; that over and above the profit so appropriated to the shareholders the printed accounts of the respondents shewed: 1st, sums paid to policy-holders in the shape of bonuses, which was a distribution of assesssable income or revenue; 2nd, additions made to the life fund, which was a transfer of income to capital; that to arrive at the net balance of profit chargeable for the life branch under the above rule it was required on the one hand to take account of the life premiums received during the last three years, and on the other to allow as deductions nothing beyond the claims actually paid under policies becoming payable in the same period, together with the expenses of managing the business; that the balance remaining would be the profit chargeable to the income tax for the life branch, and that this profit added to the untaxed profit of the marine and fire branches would represent the total liability of the respondents under schedule D.

In reply to this alternative contention of the appellant, the respondents stated as follows: In the life branch of the respondents' business there are three classes of policies, called the "Old," the "1831," and the "1846" series. The three classes are worked independently. As regards the "Old" series any

surplus which remains after payment of policies belongs to the respondents for payment of expenses and profits. As regards the "1831" and "1846" series, by the terms of the contract with the assured the surplus which remains after payment of the policies is dealt with as follows: Two-thirds of the surplus are returned to the assured, who receive payment either by way of bonus or by abatement of premium. The remaining third of the surplus goes to the respondents, who bear the whole expenses of the business. The portion that remains after payment of expenses constitutes the only profit of the respondents available for division among the shareholders. The Commissioners held that the claim of the respondents to be taxed in respect of the profits of the three branches, life, fire and marine, should be allowed, and as it appeared that the taxed investments exceeded the profits of the three branches, as arrived at by the respondents, discharged the assessment.

The question for the opinion of the Court was whether or not, for purposes of assessment to income tax, the respondents were to be dealt with as a single corporation, the income tax payable by it being determined with regard to its operations as a whole, and upon what principle the profits of the life branch should be calculated.

March 13. *Sir Henry James, A.G.* (*Sir Farrer Herschell, S.G.*, and *Dicey*, with him), for the appellant. It is contended that, for the purpose of estimating the annual profits of the life branch, if they are to be brought into the account, the sums paid to policy-holders in the shape of bonuses, and also the additions made to the life fund out of annual income must be included. First, with regard to the bonuses, if a sum is in the nature of profits of business, it is immaterial what the ultimate destination of that sum may be, whether the company get the benefit of it themselves or are bound by contract to pay it over to others: *Mersey Docks* v. *Lucas*. (1) These bonuses arise from and depend upon the business profits made by the company during the quinquennial (2) period. The moneys originally paid

(1) 8 App. Cas. 891.

(2) It was stated that the surplus was ascertained at the end of every five years.

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in by way of premium are dealt with and invested by the company in the way of their business, and according as such business is advantageously carried on or otherwise, according to the fortunes of the company with regard to the duration of lives insured, success of investments, and expenses during the quinquennial period, the surplus at the end of such period will be greater or less. The surplus is that which is available at the end of the quinquennial period for division after making due provision for future liabilities and so forth, and this must be profit of business. If not payable to the policy-holders it would be available for dividends. The question whether it constitutes profits cannot depend on the question to whom it is handed over. If the sums from which the bonuses are paid are profits, it is immaterial that the company have bound themselves by contract to allow the policy-holders to have a proportion of them instead of dividing the whole among the shareholders.

The company seek to deduct the total amount of their expenses, but if the bonuses are not profits this is incorrect; only the proportion of the expenses attributable to that portion of the surplus which represents profits ought to be deducted.

Secondly: The additions made to the life fund from income are subject to income tax as profits of business. A fund derived from the profits of a business is none the less subject to income tax because it is set aside to meet contingencies. Of course, in the first instance, when the premiums come in they must be set aside to meet future liability, but the decision in *Imperial Fire Insurance Co.* v. *Wilson* (1) is an authority to shew that in the case of insurance companies the legal and only practicable mode of estimating profits which, in the long run, taking an average of years is sufficiently just, is to take the excess of receipts over payments in each year as representing profit.

[DAY, J. That was the case of fire insurance. Fire policies only last for a year, and the surplus at the end of the year after meeting losses does represent realized profit.]

The business year and the policy year are not necessarily identical. There must be outstanding fire risks at the close of the business year for which provision must be made from the

(1) 35 L. T. 271.

surplus. There is therefore no distinction in this respect between life and fire insurance, and the decision cited is as applicable to one as the other.

[DAY, J. Practically speaking, in the case of fire insurance, if the business is on a sufficiently extensive scale, taking one year with another, the excess of receipts over payments represents the profits with sufficient exactness without going to the great expense of the actuarial calculations that would be necessary in order to calculate the value of outstanding risks at the end of each year.]

Thirdly, it is contended that the three branches, marine, fire, and life, must be treated as three distinct businesses. The company claim that, having paid income tax on 84,154*l.* 15*s.* 10*d.*, dividends on investments, of which 76,850*l.* 12*s.* belongs to the life branch, as against 7304*l.* 3*s.* 10*d.* belonging to the other two branches, and their total profit on the three branches taken together being 73,259*l.* 10*s.* 7*d.*, they have already paid income tax on more than the sum available to them for profit. But the gross profits on the marine branch are 27,635*l.* 11*s.* 9*d.*, and the gross profits on the fire branch are 75,766*l.* 19*s.* 5*d.*, whereas the gross profits on the life branch are only 27,454*l.* 9*s.* 5*d.* The bulk of the 84,154*l.* 15*s.* 10*d.* is dividends on the life fund, with which the marine and fire branches have nothing to do. The Crown claims to be entitled to income tax on the profits of the marine and fire branches as separate businesses. These are in fact separate businesses, though they are carried on by one company.

[A. L. SMITH, J. Suppose a man, as happens in a country town sometimes, carries on the business of a grocer, a draper, and a chemist in one shop. Is he to be separately assessed in respect of each as a separate business? If there is a loss on one branch of his business may he not set it off against the profit on another?]

It would depend on whether there were in fact separate businesses. If a man carried on a draper's business in one place and a chemist's in another, it would not be one business, and it cannot be the conclusive test that they are carried on under one roof. By 33 & 34 Vict. c. 61, s. 4, where several kinds of insurance are carried on, the life funds and accounts must be kept separate, and the life fund is the security of the life policy-holder.

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Sir Hardinge Giffard, Q.C. (*Charles, Q.C.*, and *Chalmers*, with him), for the respondents. The business carried on by this company must be regarded as a whole. The company is like an individual person for this purpose, and the subject of income tax is the profit made by the individual in the way of his business, whatever it may be. A farmer may carry on, in addition to his farming business, the business of a horse dealer and a cornfactor, but he would only be subject to income tax on the profits of the business he carries on regarded as a whole. The provisions of 33 & 34 Vict. c. 61, s. 4, are only aimed at the protection of the life policy holder, and have no relation to income tax. The provisions of the Act as to the mode of keeping accounts and application of funds as between the different kinds of policy holders cannot affect the question how the profits of the company are to be arrived at for income tax purposes. Neither the sums paid to the participating policy-holders by way of bonus nor the additions to the life fund are subject to income tax. The mode of calculating the profits of life insurance suggested by the appellant is wholly fallacious. The excess of premiums over policies paid and other outgoings in any year does not constitute the profit for that year. The case of *Imperial Fire Insurance Co.* v. *Wilson* (1) is not in point. There is an essential difference between fire and life insurance. The risk on a fire policy runs out in a year, and people may insure all their lives and never have a fire. So the excess of premiums in any year over losses may fairly be considered as sufficiently representing for practical purposes the realised profits of the year, without going into elaborate actuarial calculations as to value of risks outstanding at the end of the business year. But a life policy, except in the case of surrenders, which may for this purpose be disregarded, must ultimately end in a liability. The premiums do not constitute profits; they are the funds placed by insurers in the hands of the company by investment of which the payments ultimately to become due to such insurers or their representatives, whether by way of bonus or on death, are to be provided for. They are like moneys paid to a banker which he must ultimately repay. He puts out the money at interest, and that interest constitutes his business profit, but

(1) 35 L. T. 271.

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the capital must itself be repaid to the customer. It would be as correct a test of a banker's profit to deduct cheques paid during a year from sums paid in during the year and call the balance "profit" as to take the test of profits suggested by the appellant in this case. Therefore the additions to the life fund are not subject to income tax. Secondly, the sums payable by way of bonus are not profits at all. They represent the excess of premiums over what turns out to be necessary, which by contract the company agree to return to the policy-holder. The transaction amounts to this; the company from considerations of prudence, and wishing to have an ample margin, require a certain premium, but in order to get business and induce people to insure they agree that, if on the result of certain periodical account takings it proves that they have more than the amount necessary to meet the risks and liabilities and secure themselves their due profit, they shall hand back the surplus to the bonus policy-holders. The fact that the amount so paid back varies with the success of the company's trading, and comes out of what if available for the shareholders would be profits is immaterial. It is admitted that if "profits" are once arrived at their destination is immaterial. But the contention is that these never became profits. They never were profits to the company, and the individual is to be taxed on his profits. They are in the nature of outgoings necessary to earn the profits, which must be deducted before you can arrive at profits. It is as if a servant were paid by a percentage of the profits instead of by a fixed salary. The sums paid to him would be expenses not profits. The company is entitled to deduct all the expenses, although income tax is not payable on the bonuses, because all the expenses were necessary to earn the amount which ultimately constitutes shareholders' profit.

Sir Henry James, A.G., in reply.

Cur. adv. vult.

March 14. The following judgments were delivered—

DAY, J. This is an appeal from a decision of the Income Tax Commissioners for the city of London, and four questions are more or less specifically submitted upon the special case for the determination of this Court.

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The respondent company is a proprietary company which carries on the business of marine, fire, and life insurance.

In the life department they issue policies of a non-participating and also policies of a participating character. The former are issued at premiums which are calculated, when duly invested at compound interest, to cover all risk, and after payment of proportionate expense of management to yield a profit to the company; the latter are issued at higher premiums, which are similarly calculated not only to cover all risk and expense, but also to yield a considerable surplus over and above shareholders' or company's profit, out of which benefit and relief may be expected for the participating policy-holders according to their fulfilment of their life expectation, and accordingly of this surplus two-thirds are by the terms of the policies to be apportioned among these policy-holders, while the remaining one-third is to be divided among the shareholders of the company or be otherwise applicable for the benefit of the company. This surplus is determined quinquennially by ascertaining actual results and calculating contingencies, and the two-thirds which are distributable among the participating policy-holders make up a fund which is distributed either in cash payments, or by way of reduction of premiums, or by addition to the amounts insured. It is conceded that income tax is as a matter of course payable upon the latter one-third.

The first question submitted to us is whether the fund so appropriated for distribution by way of bonus among the policy-holders is or is not liable to be assessed to the income tax, or to put it in another form, whether it constitutes gains or profits within the Acts regulating the income tax. Now profits (and for the purposes of this case I shall consider that term alone) may be taken here to mean the surplus of income after defraying all, at least necessary, expenses of making it; and if the setting aside this fund for bonus distribution was a necessary expense of making the income, it would certainly not seem to be profit in the above sense—it would be that which according to the definition is to be deducted before the profit can be got at. But this fund is precisely that which the participating policy-holders stipulated by their contract should be set aside for them as a charge in their favour, and should be expended upon them; it

constitutes the sole consideration for their paying the increased premiums. Without such covenant this fund, which is built up out of these increased premiums, would not have come into existence. The setting aside of this fund—the fund itself—is then an expense necessary to the formation of the whole bonus or participating policy profit fund; but clearly it is not profit; not true or nett profit; but it is, instead of true or nett profit, an expense which has to be deducted from gross profit before true profit can be got at. It seems to me quite unimportant that the policy contract provides for apportionment of profits; that term is there used in a very general sense, and it is clear that the mere word "profit" does not solve any difficulty. Take a simple and not unfrequent illustration: a company appoint a manager at a nominal salary of say 100*l.* per annum, and to stimulate to effort and economy combined they give him besides, say, 1 per cent. upon profits. From the latter source he derives, say, 1100*l.* per annum. His whole income, viz. 1200*l.* per annum, is a charge and expense, and diminishes the true profits of the company, and the company could not be made responsible for the income tax upon the 1100*l.* any more than for that upon the 100*l.* per annum, both being alike expenses of getting the gross income. It seems to me clear that the company make their own profits, that which constitutes their one-third, certainly as to any excess of profit they may get out of participating as distinguished from non-participating policies, by agreeing to distribute and pay and by paying away to the holders of the former the bonus fund by way of inducement to insure; they do it to get the business, to get the income, and it therefore seems to me to be merely an expense necessarily incurred by the company to procure the fund, viz., the one-third of general profit which it divides among its share-holders, or otherwise appropriates to itself.

Were it material, I should be disposed to hold that bonus is not profit even in the hands of a policy-holder. No doubt it is in a sense an advantage, although certainly not profit, just as a legacy may be an advantage, but is certainly not profit. Bonuses are indeed rather inconsistent with the true idea of profit. Speedy death is profitable in life assurance. The longer a man lives the more bonuses no doubt (*cæteris paribus*) will he get, but at the

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same time the more premiums will he pay, the more interest will he lose, the longer will his estate be kept out of the expected capital, and therefore a bonus can only be regarded as at best a reduction or mitigation of loss and certainly not as profit, even to the policy-holder.

I may further observe that the fact mentioned by counsel in argument, that income tax is not levied upon the funds of mutual societies which are available for bonus, seems consistent with the view which I take of the liability of those funds of proprietary companies which are applied to bonus upon the mutual principle.

Here I may pause to observe that no one can doubt, irrespective of the authority of the case which has been cited (*Mersey Docks* v. *Lucas* (1)) that the destination of profits is utterly irrelevant upon this subject. If profit—true profit—is once existent, it matters not whether it is thrown away or well invested, spent freely or under compulsion, whether of contract or of statute.

I am of opinion, for the reasons above given, that the judgment of the Court upon this first question should affirm the decision of the Commissioners, and should be against the Crown.

The second question presented to us is as to the right of the company to deduct the whole expenses if there is no liability to pay duty upon the bonus fund.

I say that this should be answered in the affirmative, because the expenses are all necessary to realise the nett profit which remains for the company and upon which they pay the duty.

The third question is as to the right of the Crown to levy the duty upon what has been termed the life fund. This should, in my opinion, be answered in the negative. The case of the *Imperial Fire Assurance Co.* v. *Wilson* (2), to which our attention has been directed, has, in my opinion, no bearing upon the subject. In the course of the argument I have pointed out the radical distinction and difference between fire and life assurance, and I will not repeat myself further than to observe generally that, as fire insurances run out in all their incidents in one year, each payment of premium representing a thoroughly fresh transaction, it practically matters not to either side for income tax purposes

(1) 8 App. Cas. 891. (2) 35 L. T. 271.

whether the profit, which is in such case simply the excess of annual premiums received over annual losses actually sustained, is ascertained with minute accuracy by reference to the current year of each policy, or whether one takes the arbitrary year of the calendar and assumes that to be the true policy year in respect of all receipts and payments within it; the average must be substantially the same in either. In life insurance each year's premium has relation to the whole duration of the life or risk, and every year's premium has to be set aside and capitalized for payment of the future debt: in no sense whatever can the life fund as such be deemed to represent profit.

The fourth and last question submitted to us is whether the business of the company is to be dealt with as a whole, or whether it is to be dealt with as three separate businesses—marine, fire, and life insurance.

This bears upon the right to take credit generally for the income tax actually paid upon the interest on investments which mainly belong to the life insurance fund.

It seems to me that, although the funds and accounts are naturally as well as under compulsion of law kept separate, the business is substantially one business carried on by one corporate person, and that the decision of the Commissioners was hereon also correct.

I am, therefore, of opinion that the Crown have failed upon all points, and that the judgment of the Court should be in favour of the respondents.

A. L. SMITH, J. I agree in the judgment of my Brother Day except in so far as it applies to what may be called the bonus policy-holders. I have nothing to add upon the three points upon which I agree.

As regards the bonus policy-holders it is alleged on the one side that the bonuses paid to them are not assessable to income tax, whereas the Crown avers that they are.

The real question is whether in this case the amounts paid by way of bonus are or are not gains and profits of the corporation within the meaning of the Income Tax Act.

It is necessary to consider what is the real position of a bonus

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policy-holder, and it may also, as it seems to me, be well to see how and in what way he differs from a shareholder of the corporation. In the case of a shareholder the position is this. The corporation contract in consideration of money paid by him to the corporation, that they will, out of the gains and profits of their trading, pay to the shareholder from time to time a proportion of such gains and profits by way of dividend. In the case of a bonus policy-holder the position, as it seems to me, is this. The corporation contract, in consideration of money paid by him to the corporation by way of premium, that they will pay upon his death the amount stipulated to be paid by the policy, and also that they will, out of the gains and profits of their trading, pay to him from time to time a proportion of such gains and profits by way of bonus. That is, as it appears to me, the relative position of a shareholder and a bonus policy-holder in the corporation.

It is conceded that the amount distributable to the shareholder is chargeable with income tax. Why? Because it is part of the gains and profits made by the corporation. I cannot myself see why the residue, as I hold it to be, of the same fund which is distributable to a policy-holder by way of bonus should not equally be chargeable to the income tax, and I hold that it is. The gains and profits of the corporation, out of which each is to be paid, are ascertained, as it seems to me, in the same way. On the one side are placed interest upon capital (and in this is included interest upon all investments bad or good, whatever they may be, which are made by the corporation), premiums received, and any other amount paid into the coffers of the corporation. On the other side are placed payments made on policies, expenses of management, and so on. The credit balance, if any, is, in my judgment, the gain and profit made by the corporation; out of this fund, i.e., the gain and profit, both the shareholder and bonus policy-holder are respectively paid his dividend and bonus. I do not accede to the position that the bonus is merely a return of the premium to the policy-holder which is ascertained to be in excess of what the corporation should have taken from the policy-holder. In my opinion it is not so. As before stated, the bonus policy-holder pays his

premium, as I hold, to the corporation in consideration or upon condition that the corporation will pay the amount of the policy at his death, and in the meantime allow him to participate in the gains and profits, whatever they may be, of the corporation which may happen to accrue from their trading. It entirely depends upon what those gains and profits are what bonus, if any, he receives. It is suggested that the bonus payable to policy-holders should be deducted before the gains and profits of the corporation are ascertained, and this is said, as I understand, to be so, because each premium, when paid by the policy-holder to the corporation, is clogged with the condition that if there be any excess in the premium charged such excess shall be paid back. As above stated, I hold that this is not the real position of a bonus policy-holder towards the corporation. All that the bonus policy-holder is entitled to is a proportion of the balance after giving credit for all moneys received, and debiting against that sum the disbursements of the corporation. The above is my opinion. It is with diffidence that I state it, being, as I unfortunately find myself, at variance with my Brother Day; but holding it as I do I am bound to deliver it. If I am right, and if gains and profits are to be ascertained as above mentioned, then it seems to me the case cited by the Attorney General of *Mersey Docks* v. *Lucas* (1) is an authority in the Crown's favour; for when once gains and profits are attained, that case decides that it is immaterial what the ultimate destination of the same may be. For these reasons I am of opinion that the Crown's contention as to this is correct, and that the bonuses paid to the policy-holders are assessable to income tax.

[As the Court were equally divided on the question as to amounts paid to bonus policy-holders, A. L. Smith, J., withdrew his judgment on that point, and the appeal was dismissed.]

Judgment for the respondents.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Collyer-Bristow, Withers, Russell, & Hill.*

(1) 8 App. Cas. 891.

E. L.

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Jan. 22.

HEYWOOD *v.* THE BISHOP OF MANCHESTER.

Ecclesiastical Law—Bishop and Patron—Clergy—Benefice—Quare Impedit—Refusal of Bishop to institute Clerk—Grounds of Refusal—Fitness of Clerk—Offences against Ecclesiastical Law.

A bishop refused to institute a clerk in holy orders to a benefice on the grounds that he had, whilst acting as curate to a former holder of the benefice, habitually committed offences against ecclesiastical law and failed to observe the Book of Common Prayer, by wearing unlawful vestments and doing unlawful acts in respect of matters of ritual when officiating in the communion service; and that he declined to undertake not to repeat the offences in the future. In an action against the bishop in which the patron claimed a declaration that he was entitled to have the clerk instituted :—

Held, that the defendant had acted within his discretion in refusing to institute the clerk upon the grounds stated, and was therefore entitled to judgment.

JUDGMENT of Pollock, B., after trial without a jury.

The pleadings in the action, the facts proved in evidence at the trial, and the arguments of counsel, are set out in the judgment.

Charles, Q.C., and *Phillimore*, for the plaintiff.
Sir F. Herschell, S.G., and *Jeune*, for the defendant.

Jan. 22. POLLOCK, B. This is an action in the nature of a quare impedit whereby the plaintiff claims a declaration that he is entitled to have one Harry Cowgill admitted, instituted, and inducted to the church, rectory, and benefice of St. John the Evangelist, Miles Platting. The plaintiff, after alleging that he is seised in fee and entitled to the advowson of that rectory and benefice, alleges that he presented thereto the Rev. Sidney Faithorne Green, who was duly admitted, instituted, and inducted in June, 1869; that the said Green remained incumbent until November, 1882, when the benefice became vacant, and thereupon the plaintiff presented to the defendant, the Rev. Harry Cowgill, a fit clerk, and requested the defendant to admit and institute him, and to cause or procure him to be inducted into the possession of the rectory and benefice. The statement of claim then alleges that the defendant has refused and still

refuses so to do, and unjustly hinders the plaintiff in the exercise of his rights.

The defendant by his statement of defence admits the right of the plaintiff to present, but he alleges that the said Cowgill was curate to the said Green from 1877, and remained as such curate, or assistant minister, or in charge of the said church, till the 2nd of November, 1882; that while the said Cowgill was such curate and while he was in charge of the church he habitually did certain acts. The material of these are as follows:—

(1.) When officiating in the Communion Service wore certain unlawful ecclesiastical vestments other than, and besides or instead of, those appointed and allowed by law, that is to say, a cope or chasuble and alb and a stole.

(2.) When officiating in the Communion Service unlawfully mixed or caused to be mixed water with the sacramental wine used in the Communion, and also administered wine mixed with water to the communicants at the Lord's Supper.

(3.) Unlawfully used lighted candles on the communion table at which the Communion was at the said time being celebrated, or on a ledge immediately over the same, during the celebration by him of the Holy Communion, and when such lighted candles were not wanted for the purpose of giving light.

(4.) When officiating in the Communion Service and saying the prayer of consecration in the said service did not continue in a standing posture, but unlawfully knelt or bent the knee during the reading thereof.

(5.) When officiating in the Communion Service elevated the paten or bread or wafer and also the cup which had been placed on the holy table for the Communion in an unauthorized manner, and in a much greater degree than was necessary for the purpose of complying with any of the rubrics or requirements of the Book of Common Prayer and of the Communion Service.

The defendant alleges that, by reason of these acts and the circumstances under which the same were done, Cowgill was guilty of committing offences against the laws ecclesiastical, of failure to observe the Book of Common Prayer, and of obstinate disobedience to the laws, canons and constitutions of the Church: Further, that the defendant examined the said Cowgill of his

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fitness for the said rectory and benefice. At the examination it appeared from the answers of the said Cowgill to the defendant that he had habitually, while such curate or assistant minister as aforesaid, committed the acts, matters, and things set forth in the first three sub-sections of the 4th paragraph of the statement of defence, and further that he refused to celebrate divine service according to the Book of Common Prayer in respect of the said acts, matters, and things, whereupon the defendant found that the said Cowgill was a person unfit to have the said rectory and benefice.

The plaintiff by his reply states that the said Cowgill became assistant curate at St. John's, Miles Platting, in 1877, and continued so to be till the 31st of October, 1882 (but not assistant minister or in charge of the said church), all with the knowledge and permission of the defendant, but without receiving any licence or authority in writing from the defendant, and that he never was a licensed stipendiary curate at St. John's, or a beneficed priest, and that by reason of his never having attained such a position, the defendant could have at any time recalled his said permission, and summarily inhibited him from officiating in the said church and elsewhere within his diocese, but the defendant did not inhibit the said Cowgill, and did not before the 2nd of November, 1882, recall his said permission. The plaintiff further says that the said Cowgill was never admonished or censured by the defendant, or by any other ecclesiastical authority, for doing any of the matters alleged against him, nor was he warned or commanded by the defendant, or by any other ecclesiastical authority, not to do any of the said matters, and that no suit or proceeding in any court ecclesiastical had been at any time brought, or was at the time of his presentation and refusal pending, against the said Cowgill in respect of any of the said matters, neither had any indictment been preferred against him in respect of the same. The plaintiff also says that the defendant was well aware of the way or ways in which divine service was conducted at Miles Platting from the beginning of 1878 till the 2nd of November, 1882; and denies that the vestments mentioned in the statement of defence would be unlawful ecclesiastical vestments for a clergyman in priest's orders ministering in the said

church of St. John, and denies that any of the matters and things further alleged in the statement of defence would be unlawful. He further states that it was not for the reasons stated in the statement of defence that the defendant refused to admit and institute the said Cowgill, but that he so refused because the said Cowgill declined to make certain subscriptions and declarations other than and additional to those appointed by law which the defendant required of him, and because the said Cowgill refused to pledge himself upon the defendant's requirement before institution to conduct divine service in accordance with a certain standard or use prescribed by the defendant in a document published by him in the month of November, 1881, and because he refused to promise, upon the defendant's requirements before institution, to comply with such admonition as the defendant might have thought fit then to give him in regard to the future conduct of divine service in the said church.

Upon the trial, which took place before me upon the 10th and 11th of December, 1883, the defendant was called as a witness, and, after giving the dates of the proceedings against Mr. Green, stated that a monition issued against Mr. Green and he was inhibited from performing services at St. John's, Miles Platting; that in the autumn of 1882, Mr. Green having failed to comply with the terms of the monition, the living became vacant under the provisions of the Public Worship Regulation Act; that on the 24th of October, 1882, the defendant saw Mr. Cowgill with reference to his charge, and informed him that on the 27th of September he, the defendant, had informed the patron that the living was vacant, and that he was willing, if Mr. Cowgill would conduct the service of the church in accordance with law, to leave him in charge of the vacancy. Mr. Cowgill then asked for a week to consider the matter. On the 31st of October Mr. Cowgill stated that he could not accept the charge of the living on those terms. On the 27th of September the defendant gave notice to the plaintiff of the vacancy, and on the 8th of November the defendant received a letter from the plaintiff announcing his intention to appoint Mr. Cowgill to the living. On the 21st of November Mr. Cowgill was nominated by the plaintiff, and after two letters had passed between the defendant and Mr. Cowgill,

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the defendant appointed the 2nd of December to see Mr. Cowgill, and they met on that day, the archdeacon of the diocese being present. Upon that occasion Mr. Cowgill asked to be allowed to bring a witness, and the meeting was postponed. On the 13th of December the Bishop met Mr. Cowgill, when Archdeacon Anson, Mr. Burder, and the Rev. Henry Heywood, a friend of Mr. Cowgill, were present. The defendant then recapitulated what had taken place at the last meeting, and asked Mr. Cowgill if he would limit his ritual practice to the terms which the defendant had laid down upon the 25th of November, 1881, in his admonition to the clergy of his diocese. The portion of the admonition which bears upon the present case was as follows:—

"I do hereby make it known to the clergy of my diocese that it is my admonition to them as their bishop, that, until it shall be otherwise ordered by lawful authority, in public worship in their churches, and specially in the administration of the Holy Communion, they do not exceed the limits of the ritual now practised and allowed, or which may hereafter be allowed, in the cathedral church of the diocese."

Mr. Cowgill said that he considered that to give up the vestments would be to dishonour Christ, and handed in a written protest against the proceedings, which was in the following terms:—

"My Lord,—Having, since the last interview I had with your Lordship, further considered the matter and taken the advice of friends, I respectfully submit that your Lordship has no right to proceed as you proposed on the last occasion to further examine me, or to compel me to give answers to the special questions which you have framed.

"I have been ordained by an English bishop. I produce full testimonials from three clergy in your diocese. I have been and am under no Church censure. No charge of any ecclesiastical offence has been brought against me, or is now pending.

"I have been officiating for more than five years in your diocese with your knowledge and permission.

"I am ready to take all the oaths, declarations, and subscriptions required by law.

"In these circumstances it is not usual, nor is it, I submit, legal, to subject a presentee to any further examination.

"Assuming (which, however, I am not to be taken to admit) that Canon XXXIX., to which you referred, is binding and applies to my case, and has not been repealed by the Clerical Subscription Act and the new canons, I submit that your Lordship has already had examination of my fitness within the terms of that canon, and I protest most respectfully against anything further.

"If, after hearing this protest, your Lordship still requires me to answer, I will do so out of respect but under protest, and saving all my rights and those of my patron.

"H. Cowgill."

Mr. Cowgill also disputed the right of the defendant to question him, and said that the canon only meant that the bishop was to inquire and ascertain, and that the certificate of the three clergymen which he had presented was sufficient.

Mr. Cowgill's friend, Mr. Heywood, then advised him to answer such questions as should be put to him by the Bishop, and the Bishop commenced to read to him questions in writing; but Mr. Cowgill wishing for legal advice the meeting was adjourned until the 15th of December, the Bishop giving to Mr. Cowgill a copy of the questions. Upon the 15th of December the same parties met again, and Mr. Cowgill handed in a written answer to the questions.

These questions and the answers thereto are as follows:—

Q. Is it your opinion that the vestments known as the alb and chasuble appointed in King Edward VI.'s First Book are still lawful vestments for the priest to wear in ministering the Holy Communion, according to the ritual now authorized in the Church of England?

A. It is my opinion that they are lawful, the Ornaments Rubric never having been repealed.

Q. Have you not been in the habit of wearing them in such ministration during the time that you have been officiating in the parish of St. John's, Miles Platting?

A. As assistant curate of St. John's, Miles Platting, under the

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Rev. S. F. Green, I have been in the habit of wearing a vestment and an alb, and without any interference from your Lordship when the matter was brought to your notice.

Q. Is it your intention to wear these vestments if you are instituted to the rectory of the said parish?

In reference to this question Mr. Cowgill declined to make any engagement with regard to his future action.

Q. Is it your opinion that the use of the mixed chalice in the Holy Communion is lawful according to the ritual now authorized in the Church of England?

In reply, Mr. Cowgill considered that there was nothing in the Prayer Book prohibiting the use of the mixed chalice; but asked permission for more time to consider the question before giving further answer as to legality.

Q. Have you not been in the habit of using the mixed chalice when ministering the Holy Communion in the Church of St. John, Miles Platting?

Mr. Cowgill, in reply, stated that as assistant curate to the Rev. S. F. Green he had used it under his direction.

Q. Is it your intention to use the mixed chalice in the administration of the Holy Communion, if you are instituted to the rectory of the said parish?

In reply, Mr. Cowgill declined to make any engagement as regarded the future.

Q. Is it your opinion that the ceremonial lighting of candles at the ministration of the Holy Communion is lawful according to the ritual now authorized in the Church of England?

Mr. Cowgill replied that he had seen them lighted all his life, and did not feel himself then in a position to express an opinion as to their legality.

Q. Have you not been in the habit of lighting, or causing to be lighted, candles in such ceremonial manner, and not for the mere purpose of giving light, at the ministration of the Holy Communion, while you have been officiating in the church of St. John, Miles Platting?

In reply, Mr. Cowgill admitted having done so, as assistant curate, under the instructions of his incumbent.

Q. Is it your intention to use candles ceremonially lighted at the ministration of the Holy Communion, if and when you should be rector of St. John's, Miles Platting?

In regard to this question, Mr. Cowgill declined to make engagement for the future.

When the Bishop got as far as Question 6, Mr. Cowgill said in answer verbally that he declined to give any engagement, and said that having laboured with Mr. Green, whom he respected more than any man in the world, to bring the services of St. John's to their present point, he should regard himself as worse than Judas Iscariot towards Mr. Green if he undid his work. Mr. Cowgill also said that he was ready to take all the oaths and make all the subscriptions required ex animo, upon which the Bishop asked him, ex animo cujus, ex animo imponentis, or ex animo recipientis? and added that it seemed almost a profaneness to administer the oath of canonical obedience in the sense in which he was prepared to take it. That closed the interview.

Upon the 18th of December the defendant wrote to the plaintiff saying that with great regret he was obliged to refuse to institute his presentee.

On the 19th of December, 1882, the Bishop of Manchester wrote to Mr. Cowgill as follows:—

"After long and anxious consideration of all the circumstances of the case, I have been compelled, to my deep regret, and only by a strong sense of duty, to inform the patron of St. John's, Miles Platting, that I am unable to institute you to that benefice to which you have been presented by him. The reasons for my refusal I have communicated to Sir Percival Heywood at large.

"I have only to add, that if you could have seen your way to promise compliance with such admonition as I, as your bishop, might have thought fit to give you in regard to your future conduct of divine service in the church of St. John, Miles Platting, I should have felt no difficulty in instituting you. Nor is it too late to remove this difficulty now. I most earnestly desire that, for the sake of the peace of the Church, you would remove it."

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No evidence was offered at the trial of the illegal acts alleged to have been done by Mr. Cowgill beyond his own admissions contained in his answers to the questions put by the defendant. It was admitted, however, by the plaintiff's counsel as to the 4th charge that Mr. Cowgill "bent the knee," as alleged in that charge, and as to the 5th charge that Mr. Cowgill elevated the paten and cup to the height of the head, and that he had continued so to do down to the 24th of October, 1882.

It was also agreed by counsel that the value of the living was 300*l.* per annum.

It will be seen by the pleadings that two points, arising out of the course taken by the defendant, are raised for the determination of this Court.

The plaintiff's first proposition is that no sufficient ground for the refusal to admit and institute his nominee is shewn by the statement of defence or the evidence given in support of it.

Secondly, the plaintiff says that, even admitting that the defendant has shewn that good ground for refusal existed, he was bound to set forth that ground by his statement of defence, and prove it by evidence, and that, although the ground of refusal set forth by the statement of defence is that the plaintiff had done acts which might be a sufficient cause for refusal, the true ground in fact for the refusal was, not the doing of these acts by Mr. Cowgill, but that he would not submit to the proposal of the Bishop, and promise that he would limit his ritual practice to the terms which the defendant had laid down by his admonition to the clergy of his diocese.

I need hardly say that both these propositions are of great importance, and that it is necessary to consider them carefully in determining whether the legal right of the plaintiff as patron of the living has been infringed. In dealing with them it will be convenient to take the second proposition first in order. It involves a mixed question of law and fact, and before its accuracy can be determined its real meaning must be arrived at. If it be intended only to affirm that but for the refusal of Mr. Cowgill to submit to the Bishop's proposal the Bishop would have admitted him, this may be true, but the affirmance of the proposition in

this form would not avail the plaintiff, who is bound to establish that when the Bishop refused Mr. Cowgill, as he did in fact, he refused him upon a wrong ground. Again, if the proposal of the Bishop had involved an undertaking by Mr. Cowgill to do something which did not arise out of his past conduct, a proposal which, having reference to the special duty which the Bishop was then discharging, would have been in excess of his authority, a very different question would have arisen. Thus, if the Bishop had said, "It is true Mr. Cowgill that you have done acts for which I could now refuse to admit you, but I consider that these, even if continued, ought not to outweigh your moral character, your ability and zeal for religion, and your personal fitness for the particular living to which you have been nominated; if therefore you will comply with certain conditions which I feel it my duty to impose, such as the keeping of a curate, contributing to the parish schools, or the like, I will admit and institute you;" and upon Mr. Cowgill declining to be bound by these conditions the Bishop had said, "then I shall refuse you"; the question that would arise would be very different, and it might then be well argued that the true ground of refusal was not the past acts, but the declining to be bound as to the future with respect to matters foreign to those acts or their consequences as affecting the fitness of Mr. Cowgill.

It was argued on behalf of the defendant that, even if the reason for refusing given at the time was a bad one, he must be taken to have refused by virtue of any good reason which then existed, and was afterwards pleaded by him, upon analogy to the well-known rule of law whereby a man may justify the discharge of a servant for any good ground which existed at the time of the discharge, although such ground was not then insisted upon, or even known to the employer. This is a sound rule of law, and is based upon the general principle that one who does an act must be taken to do it by reason of the right that is in him, and not by reason of any cause which he may assign; and I am inclined to think that it would properly apply in the present case; but I prefer to rest my decision upon the ground that the real reason for the refusal by the defendant was that Mr. Cowgill had committed the alleged offences, although, had Mr. Cowgill agreed

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to the proposed undertaking, the defendant might have admitted him.

I may illustrate my view of what occurred thus: A distinguished soldier having committed an offence punishable by death, his Sovereign proposes that, if he would take the command of an army on foreign service, he would give him a free pardon. The soldier declines and is executed. Why? Not because he would not take the command, but because he had committed the offence. I am led, therefore, to the conclusion that upon this point my finding in fact and law ought to be for the defendant.

Reverting now to the plaintiff's first proposition, namely, that no sufficient ground for the refusal of the bishop to admit and institute the nominee of the patron is shewn by the statement of defence, or the evidence given in support of it. Although by the ecclesiastical law the bishop is judge of the fitness of any clerk presented to a benefice, it is clear that in quare impedit, upon the rejection of a patron's presentee, the bishop's plea must state, not only that the presentee is not a fit person, but also in what respect he is not fit; and state it in such a manner as will enable the patron to take issue on the objection, and the proper tribunal to judge of its soundness. This was so decided by the House of Lords in 1868, in the case of *Bishop of Exeter* v. *Marshall.* (1) The defendant in the present case has, by his statement of defence, set forth with sufficient certainty in what respect he found Mr. Cowgill to be unfit. It remains, therefore, only to see whether the grounds set forth by the defendant are sufficient in law. If they are so sufficient, although the defendant may not have been bound to act upon them by reason of the judicial discretion which is vested in him, having acted upon them he has a good defence to the present proceedings. The ground taken by the defendant's counsel with reference to this part of the case was as follows:—They cited cases in which it has been held that the acts done by Mr. Cowgill have been considered offences against the ecclesiastical law, and therefore good cause for deprivation. As to the first of the acts named in the statement of defence, they cited *Hebbert* v. *Purchas* (2); *Clifton* v. *Ridsdale* (3);

(1) Law Rep. 3 H. L. 17. (2) Law Rep. 3 P. C. 605.
(3) 2 P. D. 276.

as to the second of these acts, they cited *Martin* v. *Mackonochie* (1); as to the third, *Martin* v. *Mackonochie* (2); as to the fourth, *Martin* v. *Mackonochie* (3); and as to the fifth, *Martin* v. *Mackonochie*. (4)

Counsel for the defendant next asserted that all such as are sufficient causes to deprive an incumbent are sufficient to refuse a presentee. This rule approves itself to my mind as rational and intelligible, and it is supported by high authority. It is stated as the law by the resolution of the judges in *Specot's Case* (5), and is referred to by numerous text-writers, including Bishop Stillingfleet (who adds: "But by the Canon Law more are allowed"); Ayliffe's Parergon, p. 41; Burn's Eccl. Law, 9th ed., vol. 1, p. 156 a, and Phill. Eccl. Law, vol. 1, p. 417.

Counsel for the plaintiff denied that the defendant's proposition was good in omnibus, although they admitted that it would be sound in cases in which the cause of deprivation was one which affected the personal or moral fitness of the clerk.

Before I proceed to consider whether there is any authority for this, a difficulty presents itself in limine, namely, how can I, sitting in a temporal court, do more than inquire whether the act in question is an offence against the ecclesiastical law? If it be an ecclesiastical offence which is good ground for deprivation, how can this Court make a distinction between acts which are wrong by reason of immorality, and those which are wrong by reason of a disobedience to the law ecclesiastical in matters of vestment or ritual? That there is in fact a distinction cannot be doubted; but when once an offence against the ecclesiastical law has been established which would justify deprivation, then this Court is powerless to enter into the question of degree, and it must be left to the Bishop to consider as a matter of judicial discretion, not merely what is the character of the act itself, but whether the manner and persistency of its commission is such as to affect the fitness of the clerk who is presented to him for admission. Many cases might be put which would illustrate this view, but I think it undesirable to say more than is necessary for the decision of the issues before me.

(1) Law Rep. 2 A. & E. 116.
(2) Law Rep. 2 P. C. 365.
(3) Law Rep. 2 P. C. 365; 3 P. C. 409.
(4) Law Rep. 3 P. C. 52.
(5) 5 Rep. 57.

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It was said with some force on behalf of the plaintiff that an act of immorality must, like the ignorance of a clerk, probably affect his general fitness, whereas looking at the acts complained of against Mr. Cowgill, which are of a purely ritual character, and bearing in mind that he did them whilst he was curate to Mr. Green, and must be supposed to have been acting to some extent under his directions, they do not afford the same ground for inferring that they must render him unfit. This again is not in my view matter which can affect the judgment of this Court, although it may properly be addressed to the discretion of the Bishop; and for this reason I think that the defendant did well, having reference to the character of the acts, to interrogate Mr. Cowgill with a view to discovering quo animo the acts were done, and how far they would be likely to affect the future fitness of Mr. Cowgill should he come to fill the office of rector. The answers given by Mr. Cowgill are clear, and the more they can be pointed to as evidencing an earnest and conscientious frame of mind, the more they shew that his past acts would in all human probability be continued in future, inasmuch as they were based upon what, according to his notions, is due to God and to his congregation, and that he could not abandon them without betraying the trust committed to him as a minister of the Church.

In order to shake the authority of the resolution in *Specot's Case* (1) counsel for the plaintiff cited the case of *Bell* v. *Bishop of Norwich* (2), which was decided in Michaelmas Term, 8 & 9 Eliz., and before *Specot's Case.* (1) It was a case of quare impedit in which the Bishop of Norwich, having refused the plaintiff's presentee, pleaded as a defence that the clerk presented was one whom he ought not by the ecclesiastical law to admit, because he commonly haunted taverns and other places and played at games illegal and prohibited; wherefore and for divers other like crimes the aforesaid clerk was criminosus, and so an improper and unfit person to be instituted into the vicarage aforesaid. By the opinion of all the justices this return was held to be insufficient, for all these particular faults specially declared above are not sufficient to make the presentee criminosus, because none of them is such a crime as merits a refusal, for they are not mala in se but

(1) 5 Rep. 57. (2) Dyer's Reps. 254 b.

by a prohibition in law. In March's Cases, Case 11, p. 8, the case in Dyer, 254 b, was cited, "where the presentee was refused, because he was a common haunter of taverns, &c." This was denied by Justice Barckley to be law, in which opinion Justice Jones agreed. It is also to be observed that the case of *Bell* v. *Bishop of Norwich* (1) was cited in *Specot's Case* (2) immediately before the resolution which is relied upon by the defendant. Whether the case be law or not it does not affect the present argument, because the ground of the decision appears to have been that the Bishop was wrong in refusing for an offence, which was criminal only because it was prohibited by statute, without going on to inquire to what extent and in what manner the presentee had haunted taverns, so as to see whether his so doing affected his fitness as a vicar. I find the case is dealt with in this way in 1 Bl. Com. p. 389; and indeed it is obvious that to allow such a return by the Bishop to be good would be to enable him to evade the duty which is cast upon him of finding specifically the alleged unlawful acts, and that they are such as to render the presentee unfit. To allege merely that a man haunted taverns, without more, would scarcely seem to indicate that he was unfit to discharge the pastoral office, more than if he had been guilty of an offence against the old statutes which required that deceased persons should be buried in woollen only.

Another and, were it well founded, a more serious argument presented on behalf of the plaintiff is that the ground of objection taken by the defendant to Mr. Cowgill is not one of those which is mentioned in the case of *Bishop of Exeter* v. *Marshall.* (3) As I have already said the decision in that case was grounded upon the insufficiency of the Bishop's plea, because it did not state the person presented to have been in fact unfit, but only shewed that a bishop was not so satisfied of his fitness as to give him a special testimonial. It is true, however, that in his opinion to the House of Lords in that case the late Mr. Justice Willes, said as follows: "The key to the right decision of this case is the elementary proposition that a patron is entitled effectually to present any fit person, that is to say, a person of the canonical

(1) Dyer's Reps. 254 b. (2) 5 Rep. 57.
(3) Law Rep. 3 H. L. 17.

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age, in orders (or, at least, who can obtain ordination before admittance), of sufficient learning, and against whose orthodoxy and morals no charge can be established." This opinion is cited by Lord Cranworth with approval in the same case. It cannot, however, having reference to the nature of the question before the House, be treated as containing an exhaustive category of ecclesiastical offences which would justify refusal.

In considering whether the acts done by Mr. Cowgill would have been good ground for deprivation had they been done by a rector, I may say that this was almost admitted to be so by the plaintiff's counsel; at least, no authority was cited before me to the contrary. It may be useful, however, in dealing with this part of the case to refer to the recent authority of *Combe* v. *De la Bere*. (1) The actual decision in that case has no immediate bearing upon the present argument, but in the course of his judgment Lord Penzance, when dealing with the sentence of deprivation, says: "It is a sentence however which the necessities of modern times have rarely called for, and the instances in which it has been pronounced have not in the nature of the offences charged resembled the case now before me" (in which offences of a ritual character only were charged). "I do not on that account think it is to be doubted that deprivation stands on the same footing as the other censures of the Church, and may be inflicted in any case of a distinct ecclesiastical offence which in the judgment of the Court is of a sufficiently serious character in itself, or which is attended with sufficient circumstances of aggravation to require it." He goes on, no doubt, to say that "it is particularly applicable to cases of continuous offences, in which the lesser censures of the ecclesiastical law have been tried without effect." He cites a great many authorities, from which it is clear that, if a clerk in orders is disobedient to the lawful canons of the Church, it is good ground of deprivation. In particular he refers to a case in Cro. Jac., p. 37, as follows: "It appears that all the justices of England were summoned to the Star Chamber. The Chancellor asked 'whether the deprivation of Puritan ministers by the High Commissioners, for refusing to conform themselves to the ceremonies appointed by the last

(1) 6 P. D. 157.

canons was lawful?' Answer, 'that they held it to be lawful because the King hath the supreme ecclesiastical power which he hath delegated to the Commissioners whereby they had the power of deprivation by the common law of the realm: And the statute 1 Eliz. c. 1, s. 18, which appoints Commissioners to be made by the Queen, doth not confer any new power, but explains and declares the ancient power: And therefore they hold it clear that the King, without Parliament, might make orders and constitutions for the government of the clergy, and might deprive them if they obeyed not.' This decision involves three propositions; first, that the King may make canons and constitutions binding the clergy without the authority of Parliament. With this the present case is not concerned; secondly, that for breach of the canon law the High Commission might well deprive; and thirdly, that the power of deprivation they had not by the statute, but in exercise of the ecclesiastical law by the common law of the realm." He cites also *Caudrey's Case* (1), and after giving the effect of it proceeds as follows: "Here then is a distinct decision that the Ecclesiastical Courts may properly exercise the power of deprivation in cases where the directions of the Book of Common Prayer for the performance of divine service have not been observed, and to this there are no qualifications added. The resort by the High Commission to the extreme penalty of deprivation in place of temporary suspension renders it probable that the offence for which Robert Caudrey was deprived was one that involved an obstinate determination not to observe the book, or other circumstances of aggravation, but the law of the case did not depend upon any such circumstances; if it had, Lord Coke would assuredly not have omitted them in setting out the special verdict. It is right also to point out, before leaving this case, that the language of s. 23 of 1 Eliz. c. 2, to which the judges referred, does by implication affirm this right of deprivation, for speaking of offences against the Act (the chief and most obvious of which would be a non-compliance with the Book of Common Prayer) it reserves to the Ecclesiastical Courts the power 'to punish the same by admonition, excommunication, sequestration, or deprivation, and other censures and process, in like form as heretofore

(1) 5 Rep. 1.

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has been used in like cases by the Queen's ecclesiastical laws." After citing one other authority Lord Penzance continues: "From these authorities it is very evident, I think, that the punishment of deprivation has never been confined to any particular class or character of offences. Drunkenness, contempt, crime, dilapidations, incorrigibility, breach of the canons, disobedience to the ordinary, incapacity, neglect of duties persevered in after warning, failure to observe the Book of Common Prayer; these, with several others, form a catalogue of offences, the most diverse in character and varied in gravity. I come to the conclusion, therefore, as I have before said, that it is not the particular character of an ecclesiastical offence which alone warrants the application of the censure, but the gravity of the offence in each particular case taken in connection with its attendant circumstances, and carefully weighed in the estimation of the Court. For the purpose, however, of the present case, it is not needful that the Court should rely upon any general considerations of this kind, or travel beyond limits within which the sentence of deprivation has been already recognised; for the authorities cited have defined as punishable by deprivation the following four offences:—contempt or contumacy, incorrigible disobedience to the ordinary, incorrigible disobedience to the canons of the Church, and lastly, failure 'to observe' the Book of Common Prayer."

The last ground that was taken in favour of the plaintiff was as follows:—That assuming the acts alleged against Mr. Cowgill to have been illegal, they were of such a character and so done that it ought not to be inferred that, were he a rector, he would repeat them, inasmuch as what he did he did whilst he was curate acting under a rector who approved of them, and further, that they were unchecked either by his rector or his bishop. If this argument were presented to the Bishop as a ground whereon to rest a lenient view of the case such as might enable him, in the exercise of his judicial discretion, to say that, although these acts were done by Mr. Cowgill, they would not in the opinion of the Bishop render him unfit, it would certainly be entitled to consideration.

As presented in this Court the argument assumes a double shape; first, that the acts alleged were done by Mr. Cowgill

whilst he was a curate; and secondly, that they were unchecked by his rector or bishop; and neither of these is strengthened because it co-exists with the other. Taking the first—that the acts were done by Mr. Cowgill whilst he was a curate—this no doubt is specious, but it does not, in my judgment, alter their legal effect. It is used as if the conduct of Mr. Cowgill ought to be measured as though he had done these acts when he was in a previous state of existence. When this Court comes to consider whether the acts in question are ecclesiastical offences, if once it is established that they were, and that they were done by Mr. Cowgill as an ordained minister in the discharge of the duties of his office, I cannot inquire into the circumstances under which the offences were committed, or ask whether Mr. Cowgill did them ex mero motu, or from tender regard to the views and practices of his rector. So also as to the second branch of this argument, although it might or might not be advisable or prudent on the part of his rector or bishop to check him from doing the acts complained of, the fact that they failed to do so does not appear to me to affect the question whether or no they amounted to an ecclesiastical offence. The gist of the whole question is the fitness of Mr. Cowgill, and the acts complained of are important or otherwise in proportion as they may or may not affect this fitness. The first question, therefore, that would occur to any mind to which the facts were presented would be—were they so committed by Mr. Cowgill that they would in all probability be continued by him should he become rector? Looking to the acts themselves, and to the explanation of them given by Mr. Cowgill himself, it seems to me impossible to say that they are not such as might properly lead the defendant, in the exercise of his discretion, to the conclusion that they tend to render Mr. Cowgill unfit.

It is impossible to arrive at this conclusion without noticing that it leads to the result that a bishop may refuse a clerk presented to him upon grounds relating to acts of ritual which, had they arisen in the case of a beneficed clergyman, would, according at least to modern practice, have been dealt with in the first instance by monition and not by deprivation. This, however, cannot affect the jurisdiction of the Bishop, although it is an

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argument for the exercise by him of due caution; whereas to hold that the Bishop had no jurisdiction would be to decide that, however extreme in form or determined in purpose the past offences against ritual might be, the Bishop could not refuse, but must admit; although it might be obvious that, in accordance with the solemnly expressed intention of the clerk, he would probably, if not certainly, continue a course which must lead to deprivation—a decision which, in my judgment, would be repugnant to reason, and unfair alike to the patron, the presentee, and the parishioners.

I have cautiously abstained from saying anything which may be supposed to express an opinion as to the views entertained by Mr. Cowgill, or as to his conduct in carrying them out, but I would add, in conclusion, what is strictly pertinent to the legal question before me;—namely, that however much a difference of opinion upon matters of mere ritual is to be regretted, and however much it might be thought desirable that the rules by which the discipline of the Church in such matters is governed should be wider and more elastic, still, whilst they exist, it is of the highest importance that they should be dealt with fairly; that the proper rules of construction should be applied to them, and finally that the logical results should be loyally carried out.

The verdict and judgment will be for the defendant with costs.

Solicitor for plaintiff: *C. W. Stevens.*

Solicitor for defendant: *J. J. Garrod, for J. Burden, Manchester.*

W. A.

[IN THE COURT OF APPEAL.]

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Dec. 21.

ROBINSON *v.* TREVOR AND OTHERS.

Mortgage—Foreclosure—Priorities—Tacking—Receipt by Trustees of Building Society—6 *&* 7 *Wm.* 4, *c.* 32, *s.* 5—*Vendor and Purchaser Act*, 1874 (37 *&* 38 *Vict. c.* 78), *s.* 7—*Land Transfer Act*, 1875 (38 *&* 39 *Vict. c.* 87), *s.* 129.

The lessee of a term, in November, 1865, mortgaged it to the trustees of a building society of which he was a member, to secure the payment by him of all moneys which might become due from him pursuant to the rules of the society. In September, 1868, the lessee of the term again mortgaged it to the plaintiff to secure the sum of 70*l.* then due from him to the plaintiff, and such further sums as should thereafter be advanced by the plaintiff. Notice of the mortgage to the plaintiff was not given to the building society.

Previously to June, 1875, the lessee of the term applied to the defendants to advance to him the sum of 150*l.* on the security thereof. He informed them that the property was subject to the mortgage to the building society, but was not subject to any other incumbrance. In July, 1875, the defendants paid to the trustees of the building society the sum of 57*l.* 18*s.* 11*d.*, being the full amount due from the lessee of the term, and thereupon the trustees, under 6 & 7 Wm. 4, c. 32, s. 5, signed a receipt indorsed on the deed of mortgage to the society, acknowledging that all moneys intended to be secured by the mortgage to the building society had been paid. In the same month the defendants paid to the lessee of the term the sum of 92*l.* 1*s.* 1*d.*, being the balance of the sum of 150*l.* agreed to be advanced, and thereupon he executed a mortgage of the term to the defendants to secure payment of the sum of 150*l.* The lessee of the term afterwards became insolvent. The present action for foreclosure having been brought in a county court, the judge, by his decree, declared that the hereditaments were subject, first, to a charge of what might be due to the defendants in respect of the 57*l.* 18*s.* 11*d.* paid by them to the building society; secondly, to a charge of what might be due to the plaintiff by virtue of the mortgage to him; thirdly, to a charge of what might be due to the defendants on the security of their mortgage, so far as the same might not be included in the first charge:—

Held, affirming the decision of the Queen's Bench Division, that the priorities were correctly ascertained, and that the decree of the county court was right.

Per Brett, M.R., and Bowen, L.J., that the present case fell within the principles laid down in *Pease* v. *Jackson* (Law Rep. 3 Ch. 576).

Per Baggallay, L.J., first, on the authority of *Pease* v. *Jackson* (Law Rep. 3 Ch. 576), that the defendants had the better equity, and consequently the better right to call for the legal estate, and that the legal estate in the property comprised in the mortgage to the building society had vested in the defendants by virtue of the indorsed receipt; nevertheless that the security acquired by the defendants by reason of the legal estate becoming vested in them, did not extend beyond the amount advanced by them to pay off the

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building society, and that, as regarded the further advance, they were incumbrancers puisne to the plaintiff; secondly, that notwithstanding the Land Transfer Act, 1875, s. 129, the defendants, owing to the Vendor and Purchaser Act, 1874, were precluded from treating the property vested in them as security for the further sum advanced by them to the lessee of the term.

Fourth City Mutual Benefit Building Society v. *Williams* (14 Ch. D. 140) commented on.

THE facts and the arguments in this case are sufficiently noticed in the judgment of Baggallay, L.J.

Nov. 30. *R. Luck*, for the plaintiff.

Meysey Thompson, for the defendants.

In addition to the cases mentioned in the judgments, the following were cited in the course of the argument: *Rooper* v. *Harrison* (1); *Lee* v. *Howlett* (2); *Prosser* v. *Rice* (3); *Rice* v. *Rice*. (4)

Cur. adv. vult.

Dec. 21. The following judgments were delivered:—

BAGGALLAY, L.J. This is an appeal from an order of a Divisional Court of the Queen's Bench Division, affirming an order of the judge of the County Court of Yorkshire, holden at Stokesley and Guisborough, and the substantial question involved in it is as to the effect of a receipt indorsed upon a paid off mortgage, given to a benefit building society, established under the provisions of 6 & 7 Wm. 4, c. 32, by one of its members. The circumstances of the case are set forth in detail in a written statement, prepared and signed on behalf of all the parties to the action, and filed in the county court on the 4th of August, 1881. They may, however, be concisely stated as follows:—

By a lease dated the 16th of November, 1865, certain lands and buildings situate at Skelton, in Cleveland, in the county of York, were demised to Thomas Lowe for a term of ninety-nine years from the 13th of November, 1865. By a mortgage, dated the 29th of November, 1865, Lowe demised the said leasehold premises to the trustees of the Cleveland Benefit Building

(1) 2 K. & J. 86.
(2) 2 K. & J. 531.
(3) 28 Beav. 68.
(4) 2 Drew. 73.

Society, which was a society established under the Act of 6 & 7 Wm. 4, and of which he was a member, for the residue of the term of ninety-nine years less the last three days thereof, to secure the payment by him of all moneys which might become due from him pursuant to the rules of the society. By another mortgage, dated the 15th of September, 1868, Lowe demised the same premises to the plaintiff for the residue of the said term less the last three days thereof, to secure to the plaintiff the payment of a sum of 70*l.* then due from Lowe to the plaintiff, and of such further sums as should thereafter be advanced by the plaintiff to or on behalf of Lowe. In the last mentioned mortgage the lease and the mortgage of the 29th of November, 1865, were recited, and it was stated that the amount due from Lowe to the building society was 136*l.*, and no more. Notice of the mortgage to the plaintiff was not given by him or on his behalf to the building society. All the before mentioned deeds were duly registered in the North Riding Registry at Northallerton shortly after their respective dates. In the years 1869 and 1871 payments were made by the plaintiff to the building society on behalf of Lowe, and towards the discharge of what was due from him to the society under their security, but of these payments the defendants had no notice until after Lowe had presented his petition for liquidation, as will be presently mentioned. Previously to June, 1875, Lowe applied to the three first-named defendants, who are the trustees of a lodge of Odd Fellows and are the present appellants, to advance him the sum of 150*l.* on the security of the premises comprised in the lease of the 16th of November, 1865; he informed them that the property was subject to the mortgage to the Cleveland Society, but was not subject to any other incumbrance. The appellants agreed to make the advance; and it was further agreed between them and Lowe that they should, out of the 150*l.*, pay the amount due from him to the society on their mortgage. The appellants accordingly, on the 10th of July, 1875, paid to the trustees of the Cleveland Society the sum of 57*l.* 18*s.* 11*d.*, being the full amount then due from Lowe to the society, and thereupon the lease of the 16th of November, 1865, and the mortgage deed of the 29th of November, 1865, with a receipt signed by the trustees indorsed upon it, were handed

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over by the trustees to the appellants. The indorsed receipt was in the following terms: "We, the undersigned, being the trustees for the time being of the within mentioned Cleveland Benefit Building Society, do hereby acknowledge to have received from Thomas Lowe all moneys intended to be secured by the within deed. As witness our hands, this 11th day of June, 1875." It is the effect of this receipt that we have to consider upon the present appeal; but, before doing so, it will be convenient to advert to some further circumstances in the case. It will be observed that the receipt is dated the 11th of June, 1875, although the sum of 57*l.* 18*s.* 11*d.* was not paid to the Cleveland Society until the 10th of the following July. It is agreed that the receipt was so dated, because the arrangement was come to on or before the 11th of June. On the 20th of July, 1875, the appellants paid to Lowe the sum of 92*l.* 1*s.* 1*d.*, being the balance of the sum of 150*l.* agreed to be advanced, and, thereupon, by an indenture bearing that date, and which was duly registered at Northallerton, Lowe assigned the said leasehold premises to the appellants for all the residue of the term of ninety-nine years, by way of mortgage, to secure the sum of 150*l.* and interest. On the 29th of July, 1875, Lowe, out of the sum of 92*l.* 1*s.* 1*d.* paid to him by the appellants, paid to the plaintiff the sum of 80*l.*, in part discharge of what was then owing by him to the plaintiff under the security of the 15th of September, 1868, but of this payment the appellants were not aware until after the commencement of the action. In February, 1881, Lowe filed a petition for liquidation in the County Court of Durham, and in due course the usual liquidation resolutions were passed, and the defendant, George Edward Pybus, was appointed trustee.

In April, 1881, the action was commenced; it was in form an action for foreclosure, and its purpose was to have the priorities of the plaintiff's and appellants' securities determined. The action came on to be heard upon the before-mentioned statement of facts, the plaintiff claiming priority over the appellants for the full amount due to him under his mortgage of the 15th of September, 1868, and the appellants on the other hand claiming priority over the plaintiff for the full amount due to them under their mortgage of the 20th of July, 1875; and on the 12th of

August, 1881, the judge, by his decree bearing that date, declared that the premises in question were subject to the following charges in the following order: first, to a charge of what might be due to the appellants in respect of the 57*l.* 18*s.* 11*d.*, paid by them to the Cleveland Building Society and interest thereon from the 5th of July, 1875; secondly, to a charge of what might be due to the plaintiff on the security of the indenture of the 15th of September, 1868, for principal and interest; and thirdly, to a charge of what might be due to the appellants on the security of the indenture of the 20th of July, 1875, so far as the same might not be included in their first charge; and accounts were ordered and directions given on the footing of this declaration.

From this decree the present appellants appealed to the Divisional Court, which affirmed the decision of the county court judge, and from the judgment of the Divisional Court the present appeal has been brought. The like contention was pressed upon the Divisional Court, and has been pressed upon us, as was urged upon the county court judge; in my opinion, and for the reasons which I am about to state, that contention cannot prevail.

The receipt, indorsed upon the mortgage of the 29th of November, 1865, was in the form required by the 5th section of the Act of 6 & 7 Wm. 4, c. 32, and not in the form required by s. 42 of the Act 37 & 38 Vict. c. 42, as appears to have been assumed in the Divisional Court, but the receipt so given was, in my opinion, in the form proper to be adopted; for, although by the Act of 37 & 38 Vict. c. 42, the Act of Wm. 4 had at the date of the receipt been repealed, and provision had been made by s. 42 for an altered form of receipt, it was expressly provided that the repeal should not affect any subsisting society duly certified under the repealed Act, until such society should have obtained a certificate of incorporation under the repealing Act, for which provision was made, nor should it affect the force or validity of anything done or any security given under the rules of such society. Now s. 5 of the Act, Wm. 4 enacts that the trustees of a benefit building society may indorse upon any mortgage given by a member of the society to the trustees a receipt for all moneys intended to be secured by such

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mortgage, and that such receipt shall be sufficient to vacate the same and to vest the estate in the property comprised in such security in the person or persons for the time being entitled to the equity of redemption, without its being necessary for the trustees to give any re-conveyance of the property so mortgaged. The question of the construction to be put upon this section came under the consideration of Lord Cairns in the case of *Pease* v. *Jackson* (1), the circumstances of which are so undistinguishable from those of the case which we are at present considering, that it will be convenient to state them.

On the 12th of May, 1856, Thomas Hood, a member of the Middlesborough Benefit Building Society, established under the Act of Wm. 4, mortgaged certain freehold hereditaments to the trustees of the society to secure moneys due from him to the society; and on the 20th of August, 1857, being indebted to Pease and another, the plaintiffs in the suit, in the sum of 200*l.*, he gave them a bond for that amount and signed an agreement to execute a mortgage of the same hereditaments, the agreement containing a reference to the previous mortgage to the society; on the 3rd of July, 1860, the defendants in the suit, at the request of Hood, paid to the trustees the sum of 223*l.* 1*s.* 6*d.*, being the amount then due to them under their mortgage of the 12th of May, 1856, and the trustees thereupon and in accordance with the provisions of s. 5 of the Act signed a receipt indorsed on the mortgage-deed in discharge of all moneys intended to be secured by it, and handed over the deed and all the other title-deeds relating to the property to the defendants; on the same day Hood executed a mortgage dated the 4th of July, 1860, of the same property, to the defendants to secure to them the sum of 230*l.* 4*s.* 5*d.*, the difference between that sum and the 223*l.* 1*s.* 6*d.* paid to the trustees, being the amount of a debt then due to them from Hood. I may mention, though it does not appear upon the report (1), that the property was situate in Yorkshire, and the several deeds were duly registered in the Riding registry. The case of *Pease* v. *Jackson* (1) first came before Lord Romilly, the then Master of the Rolls, who decided in favour of the plaintiffs, allowing their claim for priority

(1) Law Rep. 3 Ch. 576.

over the defendants in respect of the whole amount due to them under their equitable mortgage. On the hearing of the appeal, the same contentions were urged on behalf of the then plaintiffs and defendants as were urged by the present plaintiff and defendants before the judge of the county court. Lord Cairns was of opinion that the 5th section of the Act of Wm. 4 must bear one of two constructions, and as the result of the then appeal would be the same whichever of the two constructions was applied, he did not deem it necessary to indicate to which of the two constructions he gave the preference. The one construction was, that if the mortgagor himself paid off the mortgage money and a receipt was indorsed stating that he had done so, thereupon, without its being necessary for the trustees to give him a reconveyance, the property would vest in him, as being, in one sense certainly, the owner of the equity of redemption. The other construction was, that, no matter by whom the mortgage money was paid, the receipt indorsed was to operate so that the legal estate in the mortgaged property was to go to whichever of all the persons entitled, in any shape or form, to the equity of redemption had the best equity to call for the legal estate. In the concluding portion of his judgment, to which, as materially affecting the question we have to decide, I shall have occasion to refer presently, Lord Cairns stated that he had decided the case on the principle of the better equity. Now, though it is no more necessary for the decision of the present case than it was in *Pease* v. *Jackson* (1), to choose between the two constructions mentioned by Lord Cairns, I feel bound to express a preference for the latter as the more comprehensive, and this view was adopted by the late Master of the Rolls in a case to which reference will be made presently. Adopting then, as I am bound to do, the views expressed by Lord Cairns, that the true effect of a receipt indorsed on a mortgage in accordance with the provisions of the 5th section of the Act of Wm. 4 is to vest the legal estate in the property comprised in the mortgage in the person having the better equity to call for a conveyance, two questions remain for consideration; the first, who, under the

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circumstances of the present case, had at the time when the receipt dated the 11th of June, 1875, was signed the better equity to call for a conveyance, as in such person the legal estate vested by operation of the statute? and the second, what amount of security or protection did the person in whom the legal estate so vested acquire? There can, I think, be no doubt as to the answer to the first of these questions.

The appellants up to the time when they advanced their money to pay off the Cleveland Society had no notice whatever of the plaintiff's mortgage; on the other hand, the plaintiff had by his mortgage distinct notice that it was not a first charge, but was subject to the previous charge to the Cleveland Society, and in addition to this the appellants had obtained possession of the title deeds to the property. The circumstances of *Pease* v. *Jackson* (1) were in every respect similar; and, following the decision of the Lord Chancellor in that case, I hold that the appellants had the better equity and consequently the better right to call for the legal estate, and that the legal estate in the property comprised in the mortgage to the Cleveland Society vested in the appellants by virtue of the indorsed receipt. Again, having regard to the decision in *Pease* v. *Jackson* (1), the answer to the second question is equally clear; in that case, under circumstances which, as I have before shewn, can be in no respect distinguished from those of the present case, the Lord Chancellor held that the security acquired by the then defendants, by reason of the legal estate becoming vested in them, did not extend beyond the amount advanced by them to pay off the society, and that, as regards the further advance they were incumbrancers puisne to the plaintiffs. In so deciding, the Lord Chancellor said that it was the circumstances attending the payment to the building society which gave the defendants the better title to call for the legal estate or to say it was in them, and that he could not agree with the argument on their behalf that, having accomplished that end, they were in as good a position as if they had got originally the legal estate by contract and were entitled to tack to it the subsequent advance. We

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were much pressed by the counsel for the appellants to adopt the views expressed by the late Master of the Rolls in the case of the *Fourth City Mutual Benefit Building Society* v. *Williams* (1), in which that learned judge, under circumstances very similar to those which we are now considering, held that the person who acquired the legal estate by virtue of an indorsed receipt got the legal estate for all purposes, including the right to tack further advances made without notice of the earlier equitable mortgage. That case was decided in 1879, upon the construction of the 42nd section of 37 & 38 Vict. c. 42, which provided that when all moneys intended to be secured to a benefit society had been fully paid or discharged, the society might indorse upon or annex to such mortgage a reconveyance of the mortgaged property to the then owner of the equity of redemption, or to such persons and to such uses as he might direct, or a receipt under the seal of the society, countersigned by the secretary or manager, in the form specified in the schedule to the Act, and that such receipt should vacate the mortgage and vest the estate in the property therein comprised in the person for the time being entitled to the equity of redemption, without any reconveyance whatever. Under this Act, therefore, there were alternative modes of proceeding; the one by indorsing or annexing a reconveyance, and the other by indorsing or annexing a receipt, and the effect of each of these alternative modes was considered by Sir George Jessel. It is not necessary to enter into the details of his judgment: it in effect amounted to this, that there were alternative modes of getting the legal estate into the same person, viz., the owner of the equity of redemption, and that such owner was the person entitled to call for a reconveyance. Now if, as regards the vesting of the legal estate, the true effect of the 42nd section of 37 & 38 Vict. c. 32, is the same as that of the 5th section of 6 & 7 Wm. 4, c. 32, and if the circumstances of the case before Sir George Jessel are not to be distinguished from those of the case before Lord Cairns, the decision of the former is in direct conflict with that of the latter, and in such case, whatever might be my own views as to

(1) 14 Ch. D. 140.

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the true construction of the 5th section of the earlier Act and as to its application to the circumstances of the present case, I should feel myself bound to follow the decision of Lord Cairns. On the other hand, if any distinction can be drawn between the effect of the two sections, or if the circumstances of the two cases can be distinguished, the decisions may not be inconsistent; but in such case, the decision of Sir George Jessel would not affect the decision of the present case. That the former hypothesis is in accordance with the views entertained by Sir George Jessel, appears, I think, from the following passage in his judgment: "Then there is a second point, which I understand was not argued at all on the part of the respondents in *Pease* v. *Jackson* (1), and was certainly assumed by me as counsel for the appellants; namely, that if the second mortgagee was entitled to the legal estate he was entitled to it altogether;" and in a later portion of his judgment he observed that the point did not seem to him to have received sufficient consideration in *Pease* v. *Jackson.* (1) I cannot adopt this view of the judgment of Lord Cairns: the point had been distinctly brought under his consideration by Sir George Jessel in opening the case of the appellants: whether the argument was replied to by counsel for the respondents does not appear from the report, but it was dealt with and disposed of in plain terms by Lord Cairns at the close of the judgment. If, however, it had been open to us to adopt the views of the late Master of the Rolls as expressed in the case referred to, they could not, in my opinion, have been acted upon in the present case, and for this reason. In the county court, and to some extent here, reference was made to the provisions of the 7th section of the Vendor and Purchaser Act, 1874, which was repealed by the 129th section of the Land Transfer Act, 1875. The 7th section of the former Act is in the following terms: "After the commencement of the Act no priority or protection shall be given or allowed to any estate, right or interest in land by reason of such estate, right or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every court to this

(1) Law Rep. 3 Ch. 576.

provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice;" this is followed by a proviso protecting estates or interests existing before the commencement of the Act, which was the 7th of August, 1874. The 129th section of the Act of 1875 is as follows: "The 7th section of the Vendor and Purchaser Act, 1874, is hereby repealed as from the day at which it came into operation, except as to anything duly done thereunder before the commencement of this Act;" the commencement of the later Act was the 1st of January, 1876. Now, in the present case, the legal estate having been acquired by virtue of the indorsed receipt, was so acquired on the 10th of July, 1875, when the amount due to the building society was paid by the appellants. At that time the 7th section of the Act of 1874 had not been repealed, and if it was still in force, the appellants would have been precluded by its provisions from holding or treating the property vested in them as a security for the further sum advanced by them to Lowe on the 20th of July, 1875. What then was the effect of the Act of 1875? If the repeal had been unqualified, inasmuch as it was to date from the time when the repealed Act came into operation, that is from the 7th of August, 1874, some doubt might have been entertained as to the effect of the 7th section; but the repeal was qualified by the provision that it was not to have operation in respect of anything duly done before the 1st of January, 1876, when the repealing Act came into operation. Under these circumstances I am of opinion that, apart from the decision in *Pease* v. *Jackson* (1), neither the indorsed receipt nor the indenture of the 20th of July, 1875, conferred upon the appellants as against the plaintiff any security for further advances beyond the £57 18*s.* 11*d.*, advanced to pay off the Cleveland Society. Various other points were raised in the Court below which have not been urged, or, at any rate, have not been pressed before us. I shall, therefore, merely refer to them without discussing details. On the part of the plaintiff it was contended that he was entitled to priority by reason of the earlier registration of his security

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in the North Riding Registry; and that, even if the earlier registration conferred no priority, it must be treated as notice to the defendants of the plaintiff's security, and that they could not be regarded as having a better equity than the plaintiff by reason of their having paid off the building society without notice of the plaintiff's security. The judge of the county court decided both these points against the plaintiff. On the other hand, it was contended on the part of the defendants that they were entitled to priority over the plaintiff on account of his not having given notice of his security to the building society, and also by reason of the defendants subsequently acquiring the legal estate in the whole term. Both these points were decided against the defendants. In my opinion, the decisions of the learned judge on all these points were in accordance with authority. Some cases were referred to, which had been decided upon the construction of the Irish Registry Act, 6 Anne, c. 2, but it must be borne in mind that under that Act a mortgagee was prohibited from tacking, so as to gain priority against a mesne registered incumbrance, and there is no such provision in the North Riding Act. For the reasons I have thus stated, I am of opinion that the judge of the county court and the Divisional Court arrived at a right conclusion as regards the priorities of the several incumbrances, and that this appeal should be dismissed. I have dealt with this case at greater length than I should have under ordinary circumstances deemed necessary, as I consider the case to fall in all respects within the decision in *Pease* v. *Jackson* (1), but so many points of more or less nicety were discussed in the county court before the very able judge of that court, that I have thought it right to consider them in the course of the present judgment, though those points have not been pressed upon us here. I am unwilling to part with this case without making a suggestion which, if adopted, might render the decision of the late Master of the Rolls not inconsistent with that of Lord Cairns, and it is this; the alternative mode of vesting the legal estate provided for by the 42nd section of the later Act, makes the indorsing of a receipt on the mortgage equivalent

(1) Law Rep. 3 Ch. 576.

to a reconveyance, and thus gives it a greater effect than that attributable to a receipt indorsed under the provisions of the 5th section of the earlier Act. I deem it unnecessary to do more than make the suggestion, as if the argument involved in it is well founded, the decision of the late Master of the Rolls can be in no respect considered as an authority in the present case, in which the receipt was indorsed and acquired its effect under the 5th section of the earlier Act.

BRETT, M.R. I agree with the conclusion at which Baggallay, L.J. has arrived, but the ground upon which I decide this case is that it is covered by the principles laid down in the judgment of Lord Cairns in *Pease* v. *Jackson*. (1)

BOWEN, L.J. I agree. It seems to me that this case is concluded by the authority of the decision by Lord Cairns in *Pease* v. *Jackson*. (1)

Judgment affirmed.

Solicitors for plaintiff: *Iliffe, Russell, Iliffe & Cardale, for G. Robson, Middlesborough.*

Solicitors for defendants: *R. M. & F. Lowe, for W. C. Trevor, Guisborough.*

(1) Law Rep. 3 Ch. 576.

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[IN THE COURT OF APPEAL.]

REEVES *v.* BARLOW.

Bill of Sale—Building Agreement—Clause vesting Materials in Landowner—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *s.* 4—*Amendment Act*, 1882 (45 *&* 46 *Vict. c.* 43).

An agreement, by a clause in an ordinary building contract, that all building and other materials brought by the builder upon the land shall become the property of the landowner, is not a bill of sale within the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31).

Brown v. *Bateman* (Law Rep. 2 C. P. 272), and *Blake* v. *Izard* (16 W. R. 108), followed.

Reeve v. *Whitmore* (4 De G. J. & S. 1; 33 L. J. (Ch.) 63), and *Holroyd* v. *Marshall* (10 H. L. C. 191; 33 L. J. (Ch.) 193), distinguished.

Judgment of the Queen's Bench Division (11 Q. B. D. 610), affirmed.

APPEAL of the plaintiff in an interpleader issue tried in the county court of Tunbridge Wells against a decision of Watkin Williams and A. L. Smith, JJ., making absolute a rule to enter a verdict for the defendant. The facts are stated in the report of the proceedings before the Queen's Bench Division (1), and also are mentioned in the judgment of this Court hereinafter set forth.

Jan. 31; Feb. 1. *W. English Harrison*, for the plaintiff. The building agreement required registration under the Bills of Sale Act, 1878. Before the Queen's Bench Division reliance was placed upon *Brown* v. *Bateman* (2); but that case was decided upon the Bills of Sale Act, 1854, the language of which is different from that of the Bills of Sale Act, 1878. The latter statute contains words meeting the facts before the Court; those words occur in the interpretation clause (s. 4): "Any agreement whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." The plaintiff no doubt must make out that the defendant had only an equitable right; but a clear right in equity to the bricks was conferred by clause 11 upon the defendant, so soon as the

(1) 11 Q. B. D. 610. (2) Law Rep. 2 C. P. 272.

bricks were brought upon the land; the words being specific, *Belding* v. *Read* (1) is distinguishable, although it would otherwise be against the argument for the plaintiff as shewing that the defendant's right to the bricks was not merely equitable.

[BOWEN, L.J. *Belding* v. *Read* (1) is perhaps of questionable authority since the decision of this Court in *Clements* v. *Matthews*. (2)]

Blake v. *Izard* (3), which is not binding upon this Court, and *Ex parte Newitt, In re Garrud* (4), were decided merely on the authority of *Brown* v. *Bateman*. (5) The building agreement contained a valid assignment in equity of the bricks: *Holroyd* v. *Marshall* (6), and in the present state of the law nothing in *Reeve* v. *Whitmore* (7) is adverse to the contention for the plaintiff. The effect of an equitable assignment is clearly explained by Jessel, M.R., in *Collyer* v. *Isaacs*. (8) Owing to the alterations which have taken place in the law as to bills of sale, *Ex parte North Western Bank, In re Slee* (9), can no longer be considered as an authority.

The building materials have been absolutely transferred to the owner of the land, and all the provisions of the Bills of Sale Act, 1878, are still in force as to absolute transfers of chattels notwithstanding 45 & 46 Vict. c. 43: *Swift* v. *Pannell*. (10)

Finlay, Q.C., and *J. C. Graham*, for the defendant. It is not now disputed for the defendant that the Bills of Sale Act, 1878, still applies to absolute transfers of chattels.

Brown v. *Bateman* (5), and *Blake* v. *Izard* (3), decided that the Bills of Sale Act, 1854, had no application to building agreements, and the same principle extends to the Bills of Sale Act, 1878. No chattels existed upon which the building agreement could operate at the time of its execution; and when the building materials were brought upon the ground, they vested in the owner of the land at law and not merely in equity. The inter-

(1) 3 H. & C. 955; 34 L. J. (Ex.) 212.
(2) 11 Q. B. D. 808.
(3) 16 W. R. 108.
(4) 16 Ch. D. 522.
(5) Law Rep. 2 C. P. 272.
(6) 10 H. L. C. 191; 33 L. J. (Ch.) 193.
(7) 4 D. J. & S. 1; 33 L. J. (Ch.) 63.
(8) 19 Ch. D. 342, at p. 351.
(9) Law Rep. 15 Eq. 69.
(10) 24 Ch. D. 210.

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pretation clause (s. 4), of the Bills of Sale Act, 1878, does enact that the expression "bill of sale" shall include "authorities, or licenses to take possession of personal chattels;" but the operation of the clause is restricted to those cases in which the authority or license is created as a security for the payment of a debt; therefore it does not extend to the present case. *Holroyd* v. *Marshall* (1) does not affect this case.

Further, the land was in possession of the owner and not of the builder: *Marquis of Camden* v. *Batterbury* (2); therefore the builder had no possession of the bricks seized by the execution creditor. Moreover, the building agreement in question was a transaction in the ordinary course of business, and was not within the Bills of Sale Act, 1878.

W. English Harrison, in reply. It is plain from the special terms of the building agreement that it is not a transaction in the ordinary course of business.

[LORD COLERIDGE, C.J. Is this building agreement in any sense a bill of sale? In order to constitute an instrument of that kind, must there not be a sale of chattels? Is such a document as this within the mischief of the Bills of Sale Acts?

BRETT, M.R. It is to be recollected that it was intended that the building materials, including the bricks, should become the property of the owner of the soil or lessor not as chattels, but as part of the freehold.]

Cur. adv. vult.

Feb. 12. The judgment of the Court (Lord Coleridge, C.J., Brett, M.R., and Bowen, L.J.), was delivered by

BOWEN, L.J. This case raises the important question whether an agreement contained in an ordinary building contract, that all building and other materials brought by the builder on the land should become the property of the landowner, is a bill of sale within the Bills of Sale Act, 1878, and must be registered in order to protect such building materials against an execution creditor.

On the 1st of January, 1883, Addie, the builder and execution

(1) 10 H. L. C. 191; 33 L. J. (Ch.) 193.

(2) 7 C. B. (N.S.) 864; 28 L. J. (C.P.) 335.

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debtor, had contracted in writing with Barlow, the landowner, to build upon Barlow's land ninety-five houses. The contract in question is an ordinary building agreement, which provided by clause 1 that Addie should be at liberty to enter upon Barlow's land for the purpose of making the roads and erecting the houses. By clause 11 it was provided, amongst other things, "that all building and other materials brought by the intended lessee upon the land shall, whether affixed to the freehold or not, become the property of the intended lessor." Reeves, the plaintiff in the interpleader issue, having recovered judgment against Addie, issued execution, and the sheriff of Kent seized a large number of bricks brought upon Barlow's land under the above clause 11. An interpleader issue having been directed between Reeves and Barlow, the county court judge, before whom the interpleader was tried, decided in favour of the execution creditor. The Queen's Bench Division reversed his decision, and the present case is an appeal from that reversal. If the present case had arisen upon the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), the case of *Blake* v. *Izard* (1) would appear to be an authority in favour of the contention that such an agreement was not a bill of sale which required registration. The question however arises under the Bills of Sale Act, 1878, which adds to the definitions of bills of sale contained in the previous statute, the following words, "also any agreement whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred." It was contended on behalf of the appellant that the case of *Blake* v. *Izard* (1) was not binding on this Court, and that in any event the present agreement fell within the additional words of the Act of 1878, and must be registered accordingly. The case of *Blake* v. *Izard* (1) had been preceded in the same year by another decision of the Court of Common Pleas in the case of *Brown* v. *Bateman* (2) which really involved the same point. In *Brown* v. *Bateman* (2) there was, it is true, no agreement in unambiguous terms that the property in the building materials should pass to the lessor when they were brought upon the lessor's premises,

(1) 16 W. R. 108. (2) Law Rep. 2 C. P. 272.

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but merely a provision that materials which should have been brought upon the premises "should be considered as immediately attached to and belonging to" the same. Two questions accordingly arose upon this clause. The first, whether it conferred upon the lessor on whose land the building materials had been brought, an interest either in law or in equity in such building materials which could not be defeated by the claim of an execution creditor. The second question which arose was, whether, assuming such interest to be created by the clause, the bill of sale ought to have been registered under the Bills of Sale Act, 1854. With respect to the first question whether an interest in law or equity were created by the clause, the Court of Common Pleas abstained from pronouncing any opinion whether the words of the clause were sufficiently unambiguous to vest the legal property of the materials in the lessor, but decided that at all events an equitable interest in them was created which gave the lessor the right to hold the goods against the execution creditor unless the agreement was void for want of registration under the statute. To decide this latter point, it was however necessary for the Court to assume the possibility of the view being correct, which they expressly refused to decide, viz., that the legal property vested in the landlord, and it follows from the judgments in that case that the Court must have meant to decide that even on this hypothesis the instrument was not within the Bills of Sale Act, 1854. "It is said," said Bovill, C.J., "that the agreement is covered by the words 'other assurances of personal chattels;' but finding those words preceded by 'assignments, transfers, and declarations of trust,' and applying to the statute the ordinary rule of construction, it seems to me that the agreement in question is not ejusdem generis with those with which the words relied on are associated, and therefore that it is not within them." This decision was followed by the Court of Common Pleas in the case of *Blake* v. *Izard* (1), to which we have already referred, decided a few months later in the same year. (1) The building agreement in this latter case was framed in a manner which avoided the first question raised in *Brown* v. *Bateman* (2), it being expressly provided that all materials

(1) 16 W. R. 108. (2) Law Rep. 2 C. P. 272.

brought "upon the premises should become the property of the lessors." The Court held that this agreement was not within the Bills of Sale Act, 1854, and Willes, J., in delivering judgment, uses the following language: "This Court has in the case of *Brown* v. *Bateman* (1) decided to respect the evident intention of the parties under these agreements. It was intended to preserve the rights of landlords, and I consider it was a most wholesome decision. It has been contended that it is a bill of sale, or that it comes within the scope of the Bills of Sale Act, but I apprehend that that question is set at rest by *Brown* v. *Bateman* (1), which shews that stipulations of the nature of building agreements are not within the scope of the Bills of Sale Act." Down to the time of the passing of the next Bills of Sale Act the two cases of *Brown* v. *Bateman* (1) and *Blake* v. *Izard* (2) remained unshaken decisions of a court of great weight. It must be taken therefore that at the time of the Bills of Sale Act, 1878, building agreements such as the present had been held not to be bills of sale which required registration: and we should not be justified in impugning the authority of those cases unless there be something in the Bills of Sale Act, 1878, which brings specifically within its operation this large class of business instruments which had previously been decided to be exempt.

The learned counsel for the appellant contended that the previously exempted case of such building agreements was directly met by the new words which the Act of 1878 for the first time introduced into the interpretation clause, and that the present agreement must be registered as being an agreement by which a right in equity to personal chattels is conferred. On the part of the respondent it was urged that a right to after-acquired property was not a right to personal chattels within the meaning of the Act of 1878. It is not necessary to pronounce an authoritative decision on this very grave point (as to which, see per Lord Chelmsford, *Holroyd* v. *Marshall* (3)), because in our judgment whatever right is conferred by the clause of the building agreement now under discussion is not a right in equity at all, but a right at law. Down to the time when the building materials

(1) Law Rep. 2 C. P. 272. (2) 16 W. R. 108.
(3) 33 L. J. (Ch.) 198.

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were brought upon the landlord's premises there was no contract relating to any specific goods at all, nor anything which could be subject to a decree for specific performance. The contract was only to apply to goods when brought upon the premises, and until this happened there was no right or interest in equity to any goods at all. Upon the other hand, the moment the goods were brought upon the premises the property in them passed in law, and nothing was left upon which any equity as distinct from law could attach. No further performance of the contract was necessary, nor could be enforced. The builder's agreement accordingly was at no time an equitable assignment of anything, but a mere legal contract that, upon the happening of a particular event, the property in law should pass in certain chattels which that event itself would identify without the necessity of any further act on the part of anybody, and which could not be identified before. *Reeve* v. *Whitmore* (1) and *Holroyd* v. *Marshall* (2) have therefore no immediate bearing on the present case. If the present agreement does not fall within the Bills of Sale Act, 1878, as conferring a right in equity, it is still governed by the decisions in *Brown* v. *Bateman* (3) and *Blake* v. *Izard* (4), authorities, which for the reasons we have mentioned, we are not prepared to review. If it had been the intention of the legislature to bring within the scope of the Act the important class of building agreements couched in this form, we think this would have been done in clear terms, and that the old interpretation clause of the former Bills of Sale Act which, so far as these instruments are concerned, had received a judicial construction that excludes them would not have been left practically unaltered. For these reasons, we are of opinion that the judgment of the Queen's Bench Division was right, and must be confirmed, with costs.

Judgment affirmed.

Solicitors for plaintiff: *Sole, Turner, & Knight.*
Solicitors for defendant: *Last & Sons.*

(1) 33 L. J. (Ch.) 63.
(2) 10 H. L. C. 191.
(3) Law Rep. 2 C. P. 272.
(4) 16 W. R. 108.

J. E. H.

[IN THE COURT OF APPEAL.]

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Nov. 15.

MILNES *v.* THE MAYOR, &c., OF HUDDERSFIELD.

Local Government Acts—Water—Supply of "Pure and Wholesome"—Contamination from Leaden Pipes—Deleterious Effect on Consumer—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 35—*Special Act* (32 & 33 *Vict. c. cx.*)

The defendants were empowered by a special Act (32 & 33 Vict. c. cx) incorporating the Waterworks Clauses Act of 1847 (10 & 11 Vict. c. 17), with the exception of certain provisions, to supply water for domestic use within the limits and from the sources described in their Act.

By s. 66 of the special Act the defendants were entitled to prescribe the material to be used for service-pipes by persons supplied with water, and by by-laws the defendants prescribed that the material might be either lead or cast-iron. Leaden service-pipes were, upon the application of the landlord of the plaintiff's house and of the plaintiff, laid down by the defendants from their mains to the house at the expense of the landlord and the plaintiff. The service-pipes when laid belonged to the consumer of the water supplied through them.

By the Waterworks Clauses Act, 1847, s. 35, "the undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act, who shall be entitled to demand a supply, and shall be willing to pay water-rate for the same."

Water which was pure and wholesome in the mains of the defendants, was supplied by them to the plaintiff, but in its passage from the mains through the service-pipes it was contaminated by the lead, and he, using the water, suffered from lead-poisoning. He sued the defendants for injuries sustained from impure and unwholesome water:—

Held, that he had no cause of action.

Judgment of Mathew, J. (10 Q. B. D. 124), affirmed.

APPEAL by the plaintiff from the judgment of Mathew, J., on further consideration in favour of the defendants. (1)

The facts of the case are fully stated in the report of the proceedings before Mathew, J. (1), and may be gathered from the above head-note.

A. Wills, Q.C., and *Waddy, Q.C.* (*C. Dodd*, with them), for the plaintiff. The defendants have committed a breach of the

(1) 10 Q. B. D. 124.

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obligation imposed by 10 & 11 Vict. c. 17, s. 35, to provide a supply of pure and wholesome water to the plaintiff who is an inhabitant of their district. The water whilst it remains in the iron mains of the defendants is, no doubt, pure and wholesome, but it has become contaminated in the service-pipe, which has been laid down by the defendants; the part of the service-pipe which is laid down in the street is the property of the defendants, although when it enters the plaintiff's premises it may belong to him. Further, it is not practicable to distribute water from the iron mains to the houses, except through leaden pipes; and if the water is rendered poisonous by passing through the service-pipes, although it is harmless whilst it is in the iron mains, it is not pure and wholesome as is required by the statute already cited. Water ought not to be called pure and wholesome which, under the ordinary circumstances of life, cannot be conveyed to the consumer without being rendered unfit for use. The defendants are in the position of traders in water, who supply it for domestic use; traders of this kind would be bound by the common law to supply to their customers who might deal with them, water fit for domestic purposes, including drinking; and it is not to be supposed that parliament intended to impose a smaller obligation upon the defendants. The defendants in fact contract to supply water fit for domestic use; they contract with their customers in Huddersfield just as much as a railway company contracts with its passengers. There is an implied warranty by the defendants, that the water which they sell shall be fit to be drunk; but the defendants have supplied that which could not be drunk with safety. It cannot have been intended that the defendants may lay down with impunity pipes which render poisonous the water flowing through them. The plaintiff was not at liberty, at least without the consent of the defendants, to alter the pipes laid down by them. The rights of the plaintiff at common law, as consumer of the water, are not at all lessened by the provisions of the statute. When a dealer contracts to supply goods fit for human food, they must be in good condition at the time of delivering them, and not merely at the time of despatching them: *Beer* v. *Walker* (1): in like manner the water supplied by the defendants

(1) 46 L. J. (C.P.) 677.

must be wholesome, not merely whilst it is in their main, but also when it reaches the plaintiff's house for use.

Sir F. Herschell, S.G., and *Forbes, Q.C.* (*R. V. Williams*, with them), were not called upon to argue.

LORD COLERIDGE, C.J. I am of opinion that this judgment is correct, and must be affirmed. The action is brought by a gentleman residing at Huddersfield, who has suffered damage, and it must be taken that he has suffered that damage from the delivering to him of water, which has been made unwholesome in its passage from the main of the defendants to his house by becoming impregnated with lead from the pipes which conduct it from the one point to the other. The damage is admitted, and the source of damage is clear, because, as this is the only portion of the service in which lead is used, and as the damage arose from lead, it is plain that the damage can come from no other portion of the service. The action is brought against the corporation of Huddersfield, who are the undertakers within the general Act of Parliament, for the damage, and in order to establish a ground of action for that damage the plaintiff must shew either that the corporation have been guilty of some breach of a contract existing between him and them, and have delivered to him an article different from that which they have contracted to deliver, or that a statutory obligation is laid upon them to deliver an article to him in a state different from that in which it has been delivered, and that they have broken that statutory obligation; in no other way that I can see can this action be sustained. The undisputed facts of the case are these. There are certain reservoirs, and leading from those reservoirs there are large mains of iron in the town of Huddersfield. The water in the reservoirs, and the water as long as it remains in the iron mains, is admitted to be perfectly good and wholesome. Between the iron mains and the houses there are certain leaden pipes. It is important to consider in whom the property of those leaden pipes is, and in whom is the control over those leaden pipes, because if those leaden pipes are the property of the corporation, and if the plaintiff has no control over those leaden pipes, and the corporation have, it may follow that, inasmuch as they are bound to

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deliver to him a wholesome article, and the whole carriage of the article from the reservoir to his house was through what belonged to, and was under the domination of, the corporation, the corporation would be liable. But I think, upon a true construction of the sections which apply to this case, that that is not so, and that the damage has arisen from causes for which, when the sections come to be looked at, the corporation is not responsible. By the Waterworks Act, 10 & 11 Vict. c. 17, s. 35, it is enacted that "The undertakers" (who are the defendants here,) "shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act." What is provided is, not that they shall deliver to the inhabitants of the town or district, but that they shall "keep in the pipes to be laid down by them" pure and wholesome water. What does "to be laid down by them" in this Act of Parliament mean? It means, in my opinion, the pipes they have a duty and are under an obligation to lay down; and if in such pipes they keep a supply of pure and wholesome water, and, to put the question in another way, if the water is pure and wholesome throughout the pipes so laid down by them, it appears to me that the corporation have performed their duty under that section. It is said that the leaden pipes, which must be laid in order to conduct the water from the main to the several private houses, and must be connected with the mains, are pipes which are laid down within the meaning of the words as I have explained them, under the 35th section, "by the corporation." But it appears to me that certainly under 10 & 11 Vict. c. 17 that is not so, because if I put aside for the moment the 44th section, which applies to small tenements, of which the house in question is not one, and which, therefore, need not be considered, with a view to determine this case, the section which does apply to this case in this Act is the 48th. First of all, I should say, it comes under a heading (which is convenient in these Acts of Parliament as separating groups of clauses the one from the other), "with respect to the communication pipes to be laid by the inhabitants, be it enacted as follows." Then comes the 48th section, so that this is with regard to a pipe to be laid by an

inhabitant, not by the corporation. I will not read the whole of the section, which is long. The owner or occupier in the position of the plaintiff in this case, "may open the ground between the pipes of the undertakers and his premises, having first obtained the consent of the owners and occupiers of such ground, and lay any leaden or other pipes from such premises, to communicate with the pipes of the undertakers."

It is plain, therefore, that under this earlier section, an inhabitant of the borough having obtained the consent of the owner of any intervening land, if such owner there be, between his premises and the main of the undertakers, may himself lay down leaden or other pipes. "Other pipes," of course, mean pipes other than leaden, and, therefore, it is left to his choice under this general Act of Parliament to lay down pipes which are of lead or any other material, between his own premises and the main of the defendants. In this particular case, I presume, the corporation of Huddersfield are the local board as well as the undertakers. I daresay the ownership of the bit of street which interposes between the plaintiff's house and the main of the defendants is the defendants' property; but for the purpose of the construction of this section of the Act of Parliament, it must be taken into account that there may be a case in which that may not be so, in which there may be a waterworks company owning the main, and a local board other than the waterworks company owning the street. The effect of this is, that, having obtained the necessary consent, the inhabitant may make the communication between his premises and the works of the undertakers either of lead or of any other material as far as this Act of Parliament is concerned. So stands the matter upon this earlier Act, which is incorporated in express terms in the Huddersfield Act of 1869. I do not see that the 19th section of the later Act, 26 & 27 Vict. c. 93, which was in the year 1863, to which the plaintiff's counsel directed our attention, has really anything to do with this question, because that enacts only that the owner or occupier of the premises supplied with water by the undertakers may not, without their consent, tamper with and touch his own pipes or their pipes; a very proper provision,

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because of course by touching their pipes he might do damage, and by touching his own pipes, if he made a serious alteration in them, he might alter the conditions of supply, and he might affect the rights of the waterworks company, or of the corporation. It is only just and right that he should not be allowed to do that without giving them notice. I do not see that the 19th section carries that provision, which is made by a section of the earlier Act of 10 & 11 Vict., any further, or that it affects this case. That being the state of the law, and the general Acts of Parliament, the Huddersfield Waterworks Act is passed in the year 1869, and in that year it is enacted that the corporation may, by agreement, lay down service-pipes between their own mains and the houses of the inhabitants. It is found as a fact in this case, that the corporation, acting under that power, did so lay down the pipes in this case by agreement between themselves, the landlord, and the plaintiff himself; they were bought by him, and whether they did or not have the full cost of such service-pipes paid before they began them, as under the 71st section they were entitled to have, I know not; but certainly they laid down the pipes, and they laid down the pipes under agreement with the plaintiff, and at the plaintiff's expense and request. Although, therefore, they were the engineers, so to say, who laid down the pipes, and laid on the water, the pipes which they so laid down at his cost and at his request were the plaintiff's pipes. It is plain, as I shall show in a moment, that it was by the plaintiff's agreement and at his desire, that these pipes, which are admitted to be the source of the injury which he has sustained, were laid down by the corporation, who are the defendants in this case. Under the Huddersfield Waterworks Act of 1869, the by-laws of 1873 were passed. Now the by-laws of 1873, No. 5, enact that as to certain service-pipes "for taking the supply of water from the main pipe of the corporation into the house, building, or premises intended to be supplied, and the stop-taps," and so on, they "shall be provided and executed by the corporation, but at the expense in all respects of the applicant, except as to the stop-tap," which, as it is important that it should remain constantly under the control of the corporation, the

corporation are to pay for. "The charges for such connecting pipes and works shall be from time to time fixed by the corporation, and the estimated amount thereof shall, if required, be paid in advance to the corporation before the corporation be called upon to commence, or permit to be commenced any of such works."

Then comes the 6th by-law, which says: "The connecting pipes and works from the street main to the consumer's premises shall, at all times, be under the control and management of the corporation, and shall be deemed to belong to them, and they shall have free access thereto at all times," and so forth. Now it is important to see what "deemed to belong to them" means, because, except for that expression, there could be no ground whatever, as far as I can see, in the series of clauses which I have been considering, for maintaining that these pipes were anything else than the property of the plaintiff, paid for by him and belonging to him, subject to certain controls, no doubt, but the property of them remaining in him. Now this 6th by-law says they "shall be deemed to belong" to the corporation. For what purpose? For all purposes? Certainly I think not. I think only for the purpose for which the corporation were empowered to make the by-law. The by-law is expressed to be made in pursuance of the 66th section of the Huddersfield Water Act, 1869. The 66th section of the Huddersfield Water Act, 1869, is this: "For preventing waste, misuse, undue consumption or contamination of the water," the corporation shall have the power to make the following provisions: they "may from time to time make such by-laws and regulations as they think necessary for the objects aforesaid, to be observed by the persons supplied with water;" and then: "By any such regulations the corporation may direct the use, and prescribe the size, nature, strength, and materials," and so forth, of these pipes. It is plain to my mind, therefore, that these by-laws, on the face of them professing to be made under the section of the Act of Parliament which they expressly set out, and under which they expressly say they are acting, must be considered to have been made only for the purpose for which they were empowered to be made, namely, "for

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preventing the waste, misuse, undue consumption, or contamination of the water;" that they do not even attempt to go beyond the line of the powers that are given them by that 66th section; and that by the expression "deemed to belong to them," it is shewn clearly that they did not mean to claim the property in them, but that they thought it right to claim such control over them as "deeming to belong to them," would give them, namely, access to them at all times, a general power and control, and other powers, which I will not repeat as I have already stated them, for which it is important that they should be in the hands of the corporation. Further, in these very by-laws—which, as I think, did not really alter the property which up to the time of the passing of these by-laws remained in the plaintiff and persons in the situation of the plaintiff—are expressions to shew that by agreement between the corporation and particular consumers pipes other than leaden, that is to say, pipes that would not have done the plaintiff damage, might have been laid down, because the very first by-law as to pipes says that "all lead pipes put in by or for the use of consumers must be new;" and it goes on to say, "Every consumer's pipe not being of cast-iron, and not otherwise authorized by these regulations," "shall be of lead," and the one before that says, "Where the internal diameter of any consumer's pipe is allowed to exceed one inch, the corporation may require the same to be of cast-iron;" shewing therefore, clearly, that pipes other than leaden pipes were contemplated in these very by-laws, and that if the corporation and the plaintiff had chosen to make an arrangement that cast-iron pipes, that is, by hypothesis, perfectly safe pipes, should have been laid down by the corporation, they had under these very by-laws which are appealed to the opportunity of making it. I may observe further that the term "consumer's pipe" is in these very by-laws defined to be a pipe not being the property of the corporation. Therefore, if in a by-law I find certain pipes are to be deemed to be their property for certain purposes, and I find afterwards those consumer's pipes are to be of various sorts, various dimensions, and various materials, and I find that "consumer's pipe" in the very by-law means a pipe which does not belong to

the corporation, it appears to me to be tolerably clear that as the corporation had only power by agreement to lay down these pipes, and as by agreement these pipes might have been either of cast-iron or lead, and as it is admitted that if they had been of anything but lead no harm would have followed, and as it is said that they were laid down of lead by agreement with the plaintiff, the plaintiff has got what he bargained for, and it is his own fault that he has been hurt, and the corporation have discharged the duty laid upon them by Act of Parliament. If it be a matter of contract, which I think it is not, they have performed the only contract they undertook to perform; they have discharged themselves of every liability which the Act of Parliament imposes upon them. No actual damage has resulted to the plaintiff from their proceedings, and the judgment of the Court below was correct. It has been said that the contract or the obligation was to deliver water which was wholesome when it got into the premises of the plaintiff. I think I have indicated the answer to that when I was dealing with the 35th section. That would be to change the terms of the Act of Parliament, and impose on the corporation an obligation which the Act of Parliament does not impose.

BRETT, M.R., and BOWEN, L.J., concurred.

Judgment affirmed.

Solicitors for plaintiff: *Sykes & Son.*

Solicitors for defendants: *Van Sandau, Cumming & Armitage, for Joseph Batley, Huddersfield.*

J. E. H.

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March 6.

THE LONDON SCOTTISH BENEFIT SOCIETY *v.* CHORLEY, CRAWFORD, AND CHESTER.

Solicitor—Defendant in Person—Costs as Solicitor—Taxation.

Where an action is brought against a solicitor who defends it in person and obtains judgment he is entitled upon taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary.

ACTION for money had and received by the defendants to the use of the plaintiffs as solicitors.

At the trial before Denman, J., the matters were referred to a barrister who certified for the defendants, and directed that the plaintiffs should pay to the defendants their costs of the reference and certificate, and that the plaintiffs should bear their own costs.

The defendants Crawford and Chester, who conducted their own defence, having presented their bill for taxation, it was objected by the plaintiffs' solicitors "that the defendants, being solicitors, and having appeared throughout the whole of the action as defendants in person, ought not to be allowed any other costs than costs out of pocket, or such costs as they would be entitled to if they were non-professional men."

The master overruled the objection, saying that, in his experience, of forty years, it had always been the practice to allow to solicitors who sued or defended in person and who obtained a judgment in their favour, the usual party and party costs, except certain charges for instructions, and he therefore gave his certificate for the amount of the defendants' costs so allowed by him upon such taxation.

A summons to review the taxation was taken out on the 8th of February, and upon the hearing before Mathew, J., it was referred to the Divisional Court.

March 4. *A. Cock*, for the plaintiffs. The costs claimed by the defendants are not expenses which they have incurred but are in the nature of profits, and so not within any statute giving costs to a

defendant since the passing of 23 Hen. 8, c. 15. The defendants will rely on the statement in the books of practice: Archbold's Practice, 13th ed., p. 82; Dixon's Lush's Practice, 3rd ed., p. 896; to the effect that a solicitor is entitled to the same costs whether he acts for a client or in his own case. But this statement is not supported by the authorities. In *Jervis* v. *Dewes* (1) the defendant, a solicitor, was held to be entitled to his costs on the ground that he had employed a London agent whose name was on the record, so that what was done by him must be considered as done through his London agent. In *Parsloe* v. *Foy* (2) the plaintiff, a country attorney, was represented by a London agent, and the action was tried in London. The only point decided was that the plaintiff was entitled to the expenses of his journey to London, his attendance having been sworn to be necessary. *Leaver* v. *Whalley* (3) was the case of a country attorney sued for a stationer's bill. He employed a London agent, the action was tried in Middlesex, and the Court decided that he was not entitled in respect of his attendance at the trial to anything but the ordinary costs of a witness, for it was not shewn that it was necessary for him to attend in person. The decision has, therefore, no real bearing on the general right to costs. In the absence of express authority the defendants' claim is opposed to the law and practice as to costs. Costs are an indemnity, the plaintiff who recovers judgment ought not to be a gainer by the mistake of the defendants: *Harold* v. *Smith*. (4) The point was regarded as an open one by Stuart, V.C., in *Price* v. *McBeth* (5), where the question was whether a solicitor who acted for himself in a suit brought against him as mortgagee was entitled to costs beyond those actually out of pocket. Where a solicitor is trustee he is not entitled to his costs for business transacted for the trust estate: Bythewood and Jarman's Conveyancing, 3rd ed., vol. ix., p. 731. [He also referred to *Gugy* v. *Brown*. (6)]

H. T. Atkinson, for the defendants. The passage in Archbold's Practice and the cases there cited shew at any rate that it has been the understanding of the profession that solicitors are

(1) 4 Dowl. 764.
(2) 2 Dowl. 181.
(3) 2 Dowl. 80.
(4) 3 H. & N. 381.
(5) 33 L. J. (Ch.) 460.
(6) Law Rep. 1 P. C. 411.

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entitled to costs such as these. In *Sclater* v. *Cottam* (1) where a mortgagee acted as his own solicitor in a suit in defence of his own title he was only allowed his costs out of pocket, but this was because he claimed them as just allowances to him as mortgagee and did not affect his rights as a party to an action, which were impliedly sanctioned. In *Jervis* v. *Dewes* (2) and *Parsloe* v. *Foy* (3) the only difficulty suggested in the way of recovering these costs was that the defendant had not himself acted as solicitor in the action or was disqualified from so acting. *Webb* v. *Lawrence* (4) is in the plaintiff's favour, for there the right of the solicitor to costs was held to turn on whether it was necessary for him to attend as witness.

A. Cock, in reply.

Cur. adv. vult.

March 6. DENMAN, J. In this action the defendants were solicitors. They employed no agents, but conducted the whole business as defendants in person. They succeeded in their defence, and obtained judgment: and the question has arisen, upon taxation of costs, whether, where a solicitor sues or defends in person, he is entitled only to such costs as any other defendant in person would be entitled to, viz., the costs out of pocket, or whether he is entitled to such costs as a successful defendant would be entitled to who does employ a solicitor, saving only such costs as are in the nature of things not chargeable by reason of their being instructions to himself, or matters of a like nature.

The master has allowed the costs in dispute, and, upon a summons at chambers, my Brother Mathew, without expressing any opinion, referred the matter to the Court; and therefore the case comes before us as an original application to review the decision of the master. We took time to consider, owing to our having ascertained that there has been some difference of opinion amongst the taxing officers upon the subject.

For the plaintiffs it was contended that these costs ought not to be allowed, and we were referred to the statute 23 Henry 8, c. 15. I do not think any question can be raised here founded upon the distinction between plaintiff and defendant. The origin of costs is to be traced to some early statutes: but none of the

(1) 3 Jur. (N.S.) 630.
(2) 4 Dowl. 764.
(3) 2 Dowl. 181.
(4) 2 Dowl. 80.

statutes and none of the rules have at all, I think, affected the question whether, in taxing costs on behalf of a successful defendant who is a solicitor, the master ought or ought not to include such costs as those which have been allowed here. That is now to be decided for the first time and by the same practice, I think, by which it was always to be decided: and we have to look at what is the proper view of the matter, just as much with reference to the present state of things as we should have had to do before the passing of the Judicature Acts, or before the more recent Acts relating to costs.

In *Harold* v. *Smith* (1) Bramwell, B., laid it down as a general principle that costs are allowed by way of indemnity; and it was argued that these costs cannot fall within that principle, because they are not costs which the defendants have incurred or for which they have become liable. This is, no doubt, a very plausible argument, but I do not think it is by any means conclusive, because, treating the costs as being in a reasonable sense of the word equivalent to an indemnity, I am not aware of any principle which ought to prevent a successful party who is a solicitor, and who does solicitor's work, from being indemnified not merely for the time he must necessarily expend as a witness in his own case, but also for the pains, trouble, and skill which he has to incur and to exercise in order to bring it to a successful conclusion. There is nothing to prevent "costs" thus incurred from falling within the fair meaning of an "indemnity," though not actually money out of pocket such as he would have had to pay if his action or his defence had been intrusted by him to another solicitor. The solicitor's time is valuable: he applies his skill to a suit or action in which he is obliged to spend his time and exercise his skill in consequence of the wrongful act of his opponent; and therefore it is not an unreasonable view that the word "costs," in the sense of an "indemnity," should be held fairly to include a reasonable professional remuneration for that work which, if he did not do it himself, would have had to be done by another solicitor and paid for by his unsuccessful opponent. If that be so, and the word "indemnity" is reasonably capable of being used in that sense, it becomes a mere question

(1) 3 H. & N. 381.

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of practice whether the costs here claimed by the defendants ought, as a rule, for it is not necessary to consider exceptional cases, to be allowed to a successful litigant, being a solicitor and conducting his own case.

I have been convinced by the argument for the plaintiffs that the cases which are usually relied on in support of the view taken by the master in this case do not decide the point either way; and, indeed, I think it is impossible to gather from them very certainly any rule upon the subject. There is also the difficulty that we have been informed that there has been some difference of opinion amongst the masters on the subject. We may therefore assume that the practice is not uniform: and we ought to decide the matter without reference to what has hitherto been done. But I cannot disregard the fact that so high an authority as the late Lord Justice Lush in his book on Practice has stated the rule to be that the costs in question are allowed: and I find, upon inquiry, that there is a very general impression on the part of the taxing officers, not only of this Division but also of the Chancery Division, that the practice is to allow proper party and party costs to a solicitor who prosecutes or defends an action in person. Almost if not all the text-books which deal with the subject take the same view.

Upon the whole, therefore, I am of opinion that notwithstanding the difference of opinion amongst the masters to which I have referred, the practice is in accordance with the ruling of the master in this case. I think it is fairly within the meaning of the statutes, not in itself unreasonable, and not adverse to the interests of the unsuccessful litigant.

MANISTY, J. I am of the same opinion; but, seeing that this is a matter of some considerable importance, I will add one or two observations, though I feel that my Brother Denman has exhausted the subject.

This is a judgment in favour of a party to an action, that party being a solicitor, and the judgment being that he recover his costs. What are his costs? It is said that because he is a party to the action, no costs, except costs properly so called, that is, money out of pocket, ought to be allowed him; and that there is no difference between a party who is a solicitor and one who is

not a solicitor. It seems to me that the observation may be answered at once, and conclusively answered. The reason why costs are allowed to a solicitor being a party, and not to another person who is not a solicitor, is simply this, that the one is a solicitor and the other is not. For instance, what a strange thing it would be that a person who is not a solicitor should be allowed solicitors' charges. When a party to an action, be he plaintiff or be he defendant, conducts it himself, and is a solicitor, if he is entitled to his costs he is entitled to them as solicitor's costs: and why should he not be? I think my Brother Denman has answered that also conclusively. Justice seems to require it. Time is money to a solicitor; and why should he not be as much entitled to his proper costs, if he affords the time and skill which he brings to bear upon the business where he is a party to the action as he is where he is not a party? Again, I agree with my Brother Denman that it is for the advantage of the party against whom the judgment is given that his opponent is a solicitor, because there are many charges which the latter cannot make and which would be allowed if the claim or defence were conducted by another solicitor. Justice and reason, therefore, seem to me to favour the conclusion to which we have come.

A statement was made which for a moment created some doubt in my mind, viz., that one of the most experienced masters of this Court has been in the habit of disallowing solicitors' costs where they are parties to the action. That expression of opinion by so competent an authority required that we should pause to inquire whether or not there was any real foundation for it. The result is that we find that there is a difference of opinion amongst the masters in what I may call the Common Law Courts; so that there is no uniform practice in this Division. But in the Court of Chancery, now the Chancery Division, it has been the uniform practice to allow the costs here claimed. Which, then, ought to prevail? I am not sure that the 11th subsection of s. 25 of the Act of 1873, which provides "generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of Equity shall prevail," does not apply to this state of things. I am quite aware that the Court of Appeal has decided that in matters of practice

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those words may be somewhat qualified, and that you must look to see which is the more reasonable rule. If we adopt that principle, is not the more reasonable rule that which gives these costs to the solicitor? So much for the practice.

Then, how has the matter been dealt with in the text-books? I have before me Chitty's (Archbold) Practice, published in the year 1845, where I find the rule thus stated,—"Where an attorney is a party to an action, and obtains a judgment in his favour, he is entitled to the same costs as if he had conducted the action as attorney for some other person; not merely the costs which another person suing or defending in person would be entitled to." It is true that the learned editor of that book refers to the three cases which were cited on the argument in this case, and which are cited in all the other books of practice as recognising the rule there laid down. It is said that these three cases are not in point. I am not quite sure that they are in point or that they help us very much. The case of *Price* v. *M'Beth* (1), however, seems to be a distinct authority upon the point. There, a decree was made in favour of a party who was a solicitor, that he should have his costs: and Vice-Chancellor Stuart held that he was entitled to solicitor's costs, and that if anything else was intended it ought to have been expressed.

For these reasons, I think the master was quite right in the conclusion he came to, and that the appeal from his decision should be dismissed.

WATKIN WILLIAMS, J. I entirely concur: but, as the matter is of general importance and interest, I desire to add a few remarks. The question is essentially one of practice: and, if it had been shewn that there had been an absolutely uniform and constant practice for a number of years, we should not have taken time to look into it. It appears, however, that there has been some diversity of opinion on the subject; though, so far as I can learn from the text-books and the reports of experienced persons, the preponderance is greatly in favour of the allowance of these costs. I desire, however, to treat the matter as if it were res nova; because, if there has been a difference of opinion amongst those who ought to be well informed, it is right that we should

(1) 33 L. J. (Ch.) 460.

go back to the principle on which it rests, and examine the statutes which first gave a right to costs. Having done so, I find that the statutes which really govern the question before us are the Statute of Gloucester, 6 Ed. 1, c. 1, which relates only to plaintiffs' costs, the 23 Hen. 8, c. 15, and the 4 Jac. 1, c. 3. These last-mentioned statutes have been repealed by 42 & 43 Vict. c. 59, which enacts however that "the repeal shall not affect," amongst other things, "any jurisdiction or principle or rule of law or equity established or conferred, or right or privilege acquired, or liability imposed or incurred, or compensation secured by or under any enactment so repealed."

Now, I confess I have not been able to solve the meaning of that enactment, taking the two parts together, viz: the repealing of a statute and the proviso or enactment that "nothing herein shall affect any principle or rule of law or equity established or conferred, &c., by or under any enactment so repealed." But this consequence, I think, must be considered to have followed, that, whatever the meaning of the repeal may be, the Act so repealed shall remain in force so far as regards any principle or rule of law enacted by it.

Now, if these two statutes of 23 Hen. 8, c. 15, and 4 Jac. 1, c. 3, are carefully looked at, they would seem both by their policy and their language to suggest—that costs like those in question here should be allowed. It is to be observed that by the statute 6 Edw. 1, c. 1, costs were given to a plaintiff, "that he should be entitled to recover the costs of his writ purchased;" and under that statute the costs so recovered by the plaintiff formed part of the damages, and at one time were awarded by the jury as compensation to the plaintiff for expenses, trouble, and annoyance to which he was put by an improper resistance of his demand. Then the statute of 23 Hen. 8, c. 15, provided that costs should be allowed to the defendant who succeeded in certain cases.

Now that statute having given costs to the defendant in certain cases only, the defect was remedied by the Act of 4 Jac. 1, c. 3. The recital seems to me to shew what was intended by giving costs both to the plaintiff and to the defendant who was successful in an action. It recites the 23 Hen. 8, c. 15, and says "this law hath been found to be very good and beneficial for the

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commonwealth, and thereby many have been discouraged from bringing frivolous and vexatious and unjust suits, because such parties are to make such recompense to the party unjustly vexed by the said unjust vexations." I read that to mean that the costs which were previously given to plaintiffs, and the costs which under the statute of Hen. 8 and under this Act were intended to be given to defendants, were to be a compensation to them for the trouble and expense and loss of time to which they were put by being troubled with vexatious and unfounded actions. It seems to me that the word "costs," though a technical term now, may very well have been used to include, not merely money expended, but any real expenditure, whether of time or money, incurred by the party in defending himself against an unjust claim. If that expenditure takes the form of employing skilled persons to do the work necessary to insure success, this would fall within the expression "costs" in its primary sense: but, if the defendant be himself a person of skill, and devotes that skill and valuable time and legal knowledge to the doing of that for which he would otherwise have been obliged to employ and pay some one else, it seems to me both upon principle and on the ground of expediency that time so spent, and skill so devoted, and professional knowledge so applied, should be compensated for under the name of "costs." It is certainly to the interest of the unsuccessful litigant that this should be so; for in that case he will pay less than he would if the defence were conducted by a solicitor who would be allowed somewhat larger costs than are allowed to a defendant who as a solicitor conducts his own defence.

If therefore this were an entirely new question, unfettered by any authority or any rule of practice, I should have come to the conclusion upon reference to the statutes and upon principle as well as expediency that the costs in question were properly allowed. The appeal will therefore be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Harries, Wilkinson, & Raikes.*
The defendants in person, *Crawford & Chester.*

A. P. S.

[IN THE COURT OF APPEAL.]

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Jan. 25.

THE QUEEN *v.* THE COMMISSIONERS OF INLAND REVENUE.
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Mandamus—Servants of the Crown—Commissioners of Inland Revenue—Return of Probate Duty—5 & 6 Vict. c. 79, s. 23.

Sect. 23 of 5 & 6 Vict. c. 79, provides for the return by the Commissioners of Stamps and Taxes of probate duty on proof by oath and proper vouchers to their satisfaction of the payment of debts of the deceased, whereby the amount of probate duty payable on the estate is reduced below the amount which has been paid. By a subsequent Act the Commissioners of Inland Revenue are substituted for the Commissioners of Stamps and Taxes. On an application by an administrator for a mandamus to the commissioners to pay to the applicant the amount of duty overpaid by him, on the ground that he had supplied evidence of overpayment and had no other legal remedy:—

Held, that the mandamus ought not to issue, for the statute created no duty between the commissioners and the applicant, whose remedy, if the decision of the commissioners could be reviewed, was by petition of right.

Rex v. *Lords Commissioners of the Treasury* (4 A. & E. 286) disapproved of.

RULE calling on the Commissioners of Inland Revenue to shew cause why a writ of mandamus should not issue directing them to return to the administrator of the estate of Edward Nathan, deceased, the sum of 1650*l.*, being part of the duty charged in respect of letters of administration, with the will annexed, granted to the applicant.

It appeared that the deceased was domiciled in France, but had assets in England. On obtaining probate the duty was paid upon all the assets in England, but subsequently it was discovered that there was a debt amounting to 55,000*l.*, and that sum was accordingly paid out of these assets. Application was made to the Commissioners of Inland Revenue for the return of the duty overpaid, under 5 & 6 Vict. c. 79, s. 23, which enacts that "where it shall be proved by oath and proper vouchers, to the satisfaction of the said Commissioners of Stamps and Taxes (1), that an executor or administrator hath paid debts due and owing from the deceased, and payable by law out of his or her personal or moveable estate, to such an amount as, being deducted from the

(1) Now the Commissioners of Inland Revenue (12 & 13 Vict. c. 1).

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amount or value of the estate and effects of the deceased for or in respect of which a probate or letters of administration shall have been granted in England after the 31st day of August, 1815, or which shall be included in any inventory duly exhibited and recorded after that day in a Commissary Court in Scotland, shall reduce the same to a sum which, if it had been the whole gross amount or value of such estate or effects, would have occasioned a less stamp duty to be paid on such probate or letters of administration or inventory than shall have been actually paid thereon, it shall be lawful for the said Commissioners of Stamps and Taxes, and they are hereby required, to return the difference; provided the same shall be claimed within three years after the date of such probate or letters of administration, or the recording of such inventory as aforesaid." The commissioners refused the application, stating that they were not satisfied that the sum of 55,000*l.* was in law a debt payable out of the English assets of the testator.

1883. Dec. 10. *Sir H. James, A.G.*, and *A. V. Dicey*, shewed cause. The Crown cannot direct a writ of mandamus to itself, nor does such a writ lie against servants of the Crown. The proper remedy of the applicant was by petition of right: *Percival* v. *The Queen* (1); *Executors of Perry* v. *The Queen* (2); *De Lancey* v. *The Queen* (3); and even if mandamus lies the Court will not issue the writ where there is another specific legal remedy: Tapping on Mandamus, p. 9; *Rex* v. *Bishop of Chester* (4); *Reg.* v. *Powell.* (5) There are three cases in which a mandamus has been issued under similar circumstances, but in two of them: *Reg.* v. *Commissioners of Stamps and Taxes* (6) and *Reg.* v. *Commissioners of Stamps and Taxes* (7), it does not appear by the reports that the objection was taken, and in *Reg.* v. *Commissioners of Stamps* (8), Sir F. Thesiger, A.G., said that the commissioners did not wish to insist on the objection that a mandamus does not lie against them. On the other hand, the judgment in *Rex* v.

(1) 3 H. & C. 217.
(2) Law Rep. 4 Ex. 27.
(3) Law Rep. 7 Ex. 140.
(4) 1 T. R. 396.
(5) 1 Q. B. 352.
(6) 18 L. J. (Q.B.) 201.
(7) 6 Q. B. 657.
(8) 9 Q. B. 637.

Commissioners of Customs (1), is in point, for there the application was for a mandamus to the customs officers to deliver up tobacco held as security for the duty on payment of an amount which the applicant said was the right duty, and Littledale, J., said: "The goods are in the hands of the officers of the Crown; a mandamus to them in this case would be like a mandamus to the Crown, which we cannot grant." In the case of *Reg.* v. *Powell* (2), the Queen was lady of the manor, and a mandamus was asked for against the steward of the manor only, in order to avoid this difficulty.

Cookson, Q.C., and *W. H. Clay*, in support of the rule. In this case the commissioners owe a statutory duty to the applicant to return to him the excess of duty. In *Reg.* v. *Lords Commissioners of the Treasury* (3) the sign manual of the Crown was, by 29 & 30 Vict. c. 39, s. 46, required, and the application was premature. It was admitted in the argument by Sir George Jessel, S.G., that if the legislature had constituted the Lords of the Treasury agents to do a particular act, mandamus might lie, and that is the case here. This is supported by *Rex* v. *Lords Commissioners of the Treasury*. (4) There, as here, money was in the hands of a servant of the Crown for a specific purpose, and mandamus lies to have that purpose carried out. In *Rex* v. *Commissioners of Customs* (5) the argument of the Attorney-General was that the customs officers had no duty to perform towards the owner of the tobacco, and that view prevailed. The Commissioners of Inland Revenue have had their duties defined by Parliament by a number of Acts down to the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), s. 26, and in carrying out these duties cannot be identified with the Crown. *Reg.* v. *Powell* (2) is distinguishable from the present case, for there the mandamus would have had to issue against the Queen, who by that title was lady of the manor, here there is an intermediate authority between the Crown and the subject with a statutory duty towards the latter, and that statutory duty arises directly there is proof, as required by the statute by oath and vouchers, that the debts have been paid. The cases of

(1) 5 A. & E. 380.
(2) 1 Q. B. 352.
(3) Law Rep. 7 Q. B. 387.
(4) 4 A. & E. 286.
(5) 5 A. & E. 380.

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Reg. v. *Commissioners of Woods and Forests* (1) and *Reg.* v. *Lords of the Treasury* (2), are authorities in favour of the application. It is said that the executor can proceed by petition of right, but that is not a specific legal remedy, it is merely an inquiry granted on the fiat of the Attorney-General, by the grace of the Crown, and carries no legal rights with it, the existence of such a remedy cannot, therefore, be a bar to this application.

Sir H. James, A.G., in reply. This is not a question of paying over money, for the applicant is seeking to enforce alleged legal rights, as to which the commissioners may take a different view from him. The money was received as part of the general revenues of the Crown, and has not been ear-marked or set aside in such a manner that it can be repaid. If the commissioners are satisfied that the duty has been overpaid they are to repay the excess, but they do not hold any particular sum for the applicant as in *Rex* v. *Lords Commissioners of the Treasury.* (3) The money cannot be part of the revenue and yet the property of the applicant so that he can ask the Court to order it to be paid over to him. All his rights can be ascertained under a petition of right in which the burden of proof will be on him and not, as on a return to a mandamus, on the Crown, and the remedy is a substantial one, for all that is necessary to obtain a fiat is to shew a primâ facie case.

DAY, J. I am of opinion that the rule should be made absolute for the issue of the writ. It seems to me that the test whether the writ should issue is, to use the language of Sir Frederick Thesiger, arguendo, in *Reg.* v. *Commissioners of Woods and Forests* (1), "Whenever a person, whether filling an office under the Crown or not, has a statutory duty towards another person, a mandamus will lie to compel him to perform it." The rule is expressed with precision and neatness, and is substantially the language used afterwards by Cockburn, C.J., and the Court, in *Reg.* v. *Lords Commissioners of the Treasury* (5), where the judges clearly distinguished the case then before them from cases in which a statutory duty has been imposed on a servant of

(1) 15 Q. B. 761.
(2) 16 Q. B. 357.
(3) 4 A. & E. 286.
(4) 15 Q. B. 761.
(5) Law Rep. 7 Q. B. 387.

the Crown to do a particular act, and held that in the case then before them no statutory duty had been imposed by any Act of Parliament on the Commissioners of the Treasury to apply particular moneys to a particular purpose. The question then which arises, and which we have to determine, is whether any such duty has been imposed in the present case. It is provided that where it shall be proved to the satisfaction of the Commissioners of Stamps and Taxes that an executor has paid debts, it shall be lawful for the said commissioners, and they are thereby required, to return the difference. Is that a statutable duty applicable to the present case? The applicant says he has shewn, by proper vouchers, that he has paid money in excess of that which he was called on to pay, and he claims that the commissioners are under a statutable duty to return him the difference that has been overpaid. Against this it is urged that they are only bound to do this if they are satisfied, and, therefore, no absolute duty has arisen. But these words must, in my opinion, receive the same construction as they would receive in contracts made between private persons, and, if so, the statutable duty to pay arises when such evidence has been produced as ought to satisfy a reasonable person. If not, there is no remedy of any kind, for the commissioners might make the same answer to a petition of right, namely, that they are not satisfied, and so avoid payment. In my opinion there is a duty imposed on the commissioners by statute to repay the probate duty overpaid directly the circumstances under which a claim for repayment arises are proved to exist by evidence which ought to satisfy them. The duty is imposed on them, not merely as persons representing the Crown, and entrusted for the time being with the moneys paid by the applicant, but as persons charged with this duty to the subject of repaying, under certain circumstances, moneys which they have received and which are under their control.

We are not, therefore, directing a mandamus to issue to the commissioners quâ servants of the Crown, but to them as under a statutable duty to the applicant which they have not discharged. It is said that we are not at liberty to direct the issue of a writ of mandamus, even if we have authority to do so,

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because, by recognized practice, such a writ never issues when there is another specific legal remedy. We were pressed with the case of *Reg.* v. *Powell* (1), but it has been pointed out that in that case the Court proceeded on the ground that they could not grant a mandamus against the Queen, as lady of the manor, and I may say further that I entertain a doubt whether a petition of right is a specific legal remedy. It is certainly not an absolute legal remedy which the applicant has under his own control. It is not even what I understand as a legal remedy, though it is one carried out in the Courts of law, for it is an appeal to the Crown to order an inquiry into the alleged claims of the suppliant, and it lies with the Crown to deal with that appeal as may seem right.

Another objection might, it seems to me, be raised to a petition of right, that the complaint against the Commissioners of Inland Revenue is, that in declining to pay this money they are not doing something under the authority of the Crown, but are violating a statutable duty imposed on them, as, in one sense, individuals, and from that point of view a petition of right would not lie. It is essentially a question of discretion for the Court whether it will withhold the writ of mandamus because there is another specific legal remedy, and I am of opinion, if it be necessary to express it, that a petition of right is not a specific legal remedy, the existence of which should prevent the issue of the writ of mandamus prayed for. The rule will therefore be absolute.

SMITH, J. In this case a rule nisi was obtained for a mandamus, and in shewing cause against this rule the Attorney-General takes the broad ground that, inasmuch as the Commissioners of Inland Revenue are servants of the Crown and officers of the Crown, a mandamus will not lie against him. I think that proposition is too large; at any rate it is too large when applied to the facts of this case. Unless there is any statutory duty imposed by statute upon one who is the officer or servant of the Crown, beyond all doubt mandamus will not go against them; and that is the decision in the case of *Reg.* v. *Lords Commissioners*

(1) 1 Q. B. 352.

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of the Treasury. (1) One cannot read that case without seeing how the Court struggled to find out in the Appropriation Act, and in the other Acts which were referred to, a legal duty upon the Lords Commissioners of the Treasury to make the payment for the costs of the prosecutions which had taken place. They were unable to do so, and upon that ground it was that they came to the conclusion that a mandamus would not lie. It was conceded in that case by Sir George Jessel, S.G., that if there had been a statutory duty imposed upon the Lords Commissioners of the Treasury to do a particular act, in that case mandamus would lie, but he argued and convinced the Court at last, that there was no such legal duty imposed by statute. Sir F. Thesiger well stated in the passage that has been read from *Reg.* v. *Commissioners of Woods and Forests* (2), what I conceive to be the law in this case, and I adopt his language. Taking that view, the only question in this case, as it seems to me, turns on the construction to be put on the 23rd section of 5 & 6 Vict. c. 79. It is argued that that Act creates a statutory legal duty upon the Commissioners of Inland Revenue upon satisfactory proof (which I think means, as my Brother Day has said, upon proof which ought to satisfy reasonable men) that over payment has been made to return the money to the applicant. I think on the true construction of that section this duty is imposed upon the Commissioners of Inland Revenue. If we are wrong upon this point, this case can go to an appeal without a return being made, as was done in the case of the Gill Cemetery (3), which went to the Court of Appeal from an order made in this Court without any return being made; or, if the parties think better, a return can be made, and upon that return this point can be argued and taken, if necessary, to the highest tribunal in this country.

The next point, is a matter of discretion for this Court, whether we should allow the writ to go or not. Whether our decision on this can be questioned on an appeal from this order, I offer no opinion, but at any rate it cannot be on the return to a mandamus, and consequently the question of letting the writ go

(1) Law Rep. 7 Q. B. 387.
(2) 15 Q. B. 761.
(3) *Reg.* v. *Burial Board of Bishops Wearmouth*, 5 Q. B. D. 67.

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because there is, or is not, a specific legal remedy, is, it seems to me, decided finally by this judgment.

Now, I do not think that a petition of right falls within the definition of a specific legal right or remedy. It seems to me, and indeed it is a matter of history, that with regard to Petitions of Right, Bovill's Act did nothing but formulate the course of procedure in petitions of right which hitherto had been in vogue. It gave no new right at all. The petition of right to Her Majesty was simply a petition to the clemency of the Crown, and she, through her Attorney General, who, if he thought there was a primâ facie case, granted his fiat in the first instance, said, "Let right be done." It is not a specific right at all which the subject has. He appeals to the clemency of the Crown to be allowed to prove his case, or to satisfy the Crown that a debt is due to him from the Crown, and he is allowed to enter into the Courts of law in order that it may be determined whether the debt that he is petitioning for is owing or not. It does not seem to me that this comes within the definition of a legal right or remedy; and, what is more, supposing judgment to be given for the applicant on the petition of right, how is he to get execution against the Crown? Of course it is known that if money is found to be due to the applicant that money is always paid, but assuming that it were not paid I am unaware how he would, by any right which is existing in him, obtain the money which is found to be due. The Attorney General stated that in three cases, petitions of right had been allowed. The case of *Percival* v. *The Queen* (1) was a case upon a very similar statute to that which we have to construe. In that case no point was taken whether the petition of right would lie. The other two cases are not so much in point, but in none of the three cases was the point argued as to whether a petition of right was or was not the proper way to proceed. Being therefore of opinion that the applicant has the right to come to this Court for a mandamus, so as to put the inland revenue to a return to that mandamus, either by stating matters of law or stating matters of fact, I agree that the rule must be made absolute.

Rule absolute.

A. M.

(1) 3 H. & C. 217.

The defendants appealed.

25th January, 1884. *Sir H. James, A.G.*, and *A. V. Dicey*, for the defendants.

Cookson, Q.C., and *W. H. Clay*, for the prosecutor.

In addition to the authorities cited before the Queen's Bench Division the following were mentioned in the course of the argument in this Court: *Thomas* v. *The Queen* (1); *In re Baron de Bode* (2); *Rex* v. *Lords of the Treasury, In re Smyth* (3); *Reg.* v. *Commissioners of Woods and Forests* (4); *Rex* v. *Archbishop of Canterbury* (5); *Braunstein* v. *Accidental Death Insurance Co.* (6)

BRETT, M.R. In this case money was paid to the Commissioners of Inland Revenue in respect of the devolution of personal property. It is admitted that by the Act of Parliament which imposes the probate duty, this money was properly paid to them in the first instance, but it is alleged by the prosecutor that, upon certain proof brought forward by him, a portion of the amount so paid ought to have been returned to him. The commissioners declined to repay that money on the ground that they were not satisfied that the claim was properly made out under the statute; and thereupon the prosecutor applied to a Divisional Court for a mandamus to the Commissioners of Inland Revenue to pay him the money which he said he had proved ought to have been repaid to him, and the mandamus having been granted the defendants have appealed to us on several grounds. It was suggested that by the Act of Parliament the commissioners are made the sole and exclusive judges whether the money, under such circumstances, should be repaid or not, that they had exercised that jurisdiction, and that therefore their decision could not be reviewed. It was also urged that, inasmuch as this money was paid to these commissioners as servants of the Crown for the use of the Crown, no writ of mandamus could issue to them under any circumstances. It was, thirdly, urged on behalf of the Crown, that, even assuming that the Queen's Bench Division has jurisdiction to issue a mandamus under these circumstances

(1) Law Rep. 10 Q. B. 31.
(2) 6 Dow. 776.
(3) 4 A. & E. 976.
(4) 17 L. J. (Q.B.) 341.
(5) 8 East, 213.
(6) 1 B. & S. 782.

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to the commissioners, yet according to the rule, which has always been acted upon in the Queen's Bench, a mandamus ought not to issue in respect of this claim, because if this money ought to be repaid to the prosecutor under the circumstances which have occurred, he has another sufficient remedy. On behalf of the prosecutor, it was stated that the mandamus ought to go because a duty is imposed upon these commissioners by Act of Parliament, under the circumstances which have occurred, to pay back the sum of money claimed by the prosecutor, and that wherever a duty is imposed upon particular persons, whether individually or collectively, if there is no other legal remedy, a mandamus ought to issue; and that there was in fact no other legal remedy. With regard to the first point suggested on behalf of the Crown, that the decision is solely entrusted to the commissioners, it was urged that the meaning of the Act of Parliament is not merely that they must be satisfied in fact, but that they are bound to repay the money if the circumstances are such that they ought to be satisfied. The Divisional Court granted the mandamus, and so far as I understand their judgments they decided three points. They decided that a duty was imposed upon the commissioners by the statute, under the circumstances, to repay the money, or, at all events, that it appeared primâ facie that the circumstances were such that they were bound to repay the money; and they held that that was a duty to the prosecutor upon which the prosecutor was entitled to insist, and on that ground they said that a mandamus might issue. They agreed with what was urged on behalf of the prosecutor, viz., that the meaning of the statute is not merely that the commissioners must be satisfied in point of fact, but that there is an obligation on them to repay the money if the circumstances are such that they ought to be satisfied. With regard to the rule imposed upon the Queen's Bench Division by repeated decisions, that they ought not to grant a writ of mandamus if there is any other reasonable remedy, they construed that rule to be that a mandamus must be issued if there is no other legal remedy, and they held that a petition of right is not such a legal remedy as is intended in that proposition; because, they said, it depends upon the fiat of the Crown. The question before us, is

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whether we can agree with the Divisional Court upon any of those points which they have thus decided, or upon such of them as would govern this case. Now with regard to the first point to which I have alluded—that this statute imposes not only a duty upon the commissioners to repay money under such circumstances as are suggested here, but that it is a duty to the prosecutor—if it is meant that the statute raises a relation between the prosecutor and the commissioners as a body, or individually, to repay this money, it seems to me that it would follow that the prosecutor might maintain an action against the commissioners founded upon the statute. If an action will lie, then a mandamus cannot issue. That is admitted by everybody. Therefore the foundation of the application is that no such action will lie, and if no such action will lie, it seems to me that it must be on the ground that although the statute does impose upon the Commissioners of Inland Revenue a duty, it is not a duty which raises any relation between them and the prosecutor; it is a duty not to the prosecutor, but to some one else. Now let us see to what other person that duty is owing. This money, as it seems to me is not money paid to these commissioners in their own right, either officially or individually. It is money paid to the Crown, and for the use of the Crown; it is in fact paid to the commissioners, but only as the hands into which, and through which, it is to pass. It is paid to them merely as the servants and agents of the Crown; they have no right to hold it or to deal with it as against the orders of the Crown. By 55 Geo. 3, c. 184, or by subsequent Acts, the Crown is entitled to make rules of conduct with regard to these commissioners as to the mode in which they are to deal with the money; and that right has been exercised to this extent, that they are directed not to keep it in their hands, but to pay it over into the general fund of the country every day. That right in the Crown to make those regulations either is given by Act of Parliament, or, perhaps existed without the necessity of any Act of Parliament, on this ground, that the money is paid to the commissioners by the statute of George III. as the mere servants of the Crown: and as such they are bound to obey the orders of the Crown. The money when paid, therefore, is paid into the general

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funds of the country, that is to say, in contemplation of law, it is paid into the hands of the Crown. If that be so, the meaning of the Act of Parliament, which says that these servants of the Crown are to pay back money which belongs to the Crown, and which is in the possession of the Crown, and no longer in the actual possession of the Commissioners of Inland Revenue, is that it is a duty imposed upon them as servants of the Crown; and the duty imposed upon them is a statutory duty which they then owe to the Crown. The statute is also an enabling statute, because it enables them, without a direct order from the Crown in each particular case, to get back from some other department of the executive, but which is after all from the Crown, and out of the general fund into which it has been paid, the money which is to be repaid to such persons as the prosecutor if they make out their case. Therefore the right of this prosecutor (if any) seems to me to be a right against the Crown in respect of moneys which are in the hands of the Crown and belong to the Crown. If that is so, then no action will lie because an action will not lie against servants of the Crown. I have said that I do not think the statute gives any individual an action against the commissioners for the reasons I have stated, viz., that it raises no relation between the applicant and the servants of the Crown; therefore the claim upon which the prosecutor insists must be a claim against the Crown. If the prosecutor therefore has any remedy in this case it must be by petition of right. I say "if he has any remedy at all," because if the true construction of the statute is that the right to repayment depends upon whether the commissioners are satisfied in fact or not—in other words, if the true meaning of the statute is that they are made the ultimate and sole judges whether the money shall or shall not be returned, not even a petition of right will lie. I do not think it necessary to decide in this case that the officials in a department of the government have been constituted the sole and exclusive judges whether they ought to be satisfied or not. I should be very loth to hold that that is so, and to think that no remedy is open to persons in the position of the prosecutor in this case; but I think that no action will lie, and no suit in equity will lie,

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because this money is in the hands of the Crown, and if it can be got back at all it must be got from the Crown. But if there is any remedy, that is to say, if the exclusive power of dealing with this matter is not in the hands of the commissioners, if they are not made the sole judges of it, I can see no reason why a petition of right should not be the proper remedy. A petition of right will lie to the Crown upon the simple statement that the money is in the hands of the Crown, and that it ought to be paid back. On that averment it will be open for the Crown to say, by demurrer or otherwise, that a petition of right will not lie because the exclusive right is in the commissioners to determine this case.

Then comes the question, it being assumed that a petition of right will lie, whether we can agree with the Divisional Court in deciding that because an action will not lie, although a petition of right will lie, a mandamus ought to issue? Both the learned judges in the Divisional Court seem to have decided that point in favour of the prosecutor, and to have said that although a petition of right will lie, yet, inasmuch as it is not an absolute legal remedy, it is not within the rule which governs the discretion of the Queen's Bench Division: and therefore although a fiat may be granted, yet a mandamus ought to issue if the mandamus is asked for. The rule governing the discretion of the Queen's Bench Division seems to me to have been clearly laid down by Lord Mansfield in *Rex* v. *Bank of England.* (1) There he says, "When there is no specific remedy the Court will grant a mandamus that justice may be done." The construction of that sentence is this: Where there is no specific remedy and by reason of the want of that specific remedy justice cannot be done unless a mandamus is to go, then a mandamus will go. If a petition of right is not a specific remedy, it being clearly not a legal remedy known to the common law—it is not within the writs which were known to the common law—then this petition of right is, no doubt, not an absolute legal remedy. If a specific remedy means a legal or equitable remedy to which the party is entitled without leave from anybody, a petition of right is not within that proposition. Then comes the question, is a

(1) 2 Douglas, 524, at p. 526.

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petition of right a specific remedy by which justice can be done? It being assumed that the claim is against the Crown, the only remedy if it be not by mandamus is by a petition of right. That raises the question, whether a petition of right is a specific remedy within the proposition mentioned by Lord Mansfield? It is said that it is not, because it depends upon the fiat of the Crown. There cannot be the least possible difficulty in the way of this prosecutor obtaining the fiat of the Crown. Therefore the statement that it is not a specific remedy by which justice may be done, on the mere ground that it requires the fiat of the Crown, the granting of which depends upon a judicial discretion, seems to me to be unfounded. It might have been said at one time that although it was a specific remedy, it was not a specific remedy by which justice could be satisfactorily obtained. That might have been said formerly with regard to a petition of right. There were such great difficulties in the management of it, and such uncertainty connected with it, that the Court might perhaps have said that although it was a specific remedy, it was not a satisfactory mode of obtaining justice. Having regard to the Petitions of Right Act, 1860, which regulates the mode in which a petition of right is conducted, it seems to me that no one can now properly say that justice will not be obtained in a satisfactory manner by means of a petition of right: so far from a petition of right being an unsatisfactory mode of obtaining justice, it seems to me that by reason of that Act it has become a much more satisfactory mode of obtaining justice than a mandamus and the return to a mandamus, because many things may be done and many powers may be exercised in the case of a petition of right, which certainly cannot be exercised in the case of a mandamus and a return. I think that a remedy which can be obtained by a petition of right is a specific remedy, and a remedy by which justice can be satisfactorily done. If that be so, is it not within the rule? Is the rule that which Day, J., has very stringently laid down, that a mandamus is only to be refused in a case where there is an absolute legal remedy? Is not a petition of right just as much within the rule, at all events within the principle of the rule, as an action at law? It seems to me that it is, that the true proposition is laid down by Lord Mansfield, and

that it is not subject to the further restrictions put upon it by Day, J., which as I have said before would seem to me to make it impossible to refuse to grant a mandamus. Where there is no specific remedy by which justice can be done, the Court will grant a mandamus, but where there is a specific remedy by which the subject will get justice by a judicial decision of the Courts, then it is within the reason of the rule, that if there is such a remedy a mandamus ought not to issue. I am of opinion that a remedy by a petition of right would enable the prosecutor to obtain satisfaction by means of a judicial decision of the Courts of this country, and that therefore it is within the rule. I leave the question at present open, if the fiat were refused what would be done? Whether the Queen's Bench Division might not issue a mandamus if a petition of right could not be maintained, I do not in this case decide. I therefore cannot agree with the decision of the Queen's Bench Division in this case, and inasmuch as the fiat for a petition of right could certainly have been obtained to try the claim, I am of opinion that mandamus is not a proper remedy, and that the proper remedy for the prosecutor would have been to apply to the Crown by a petition of right. This was offered by the Attorney-General in our presence.

The commissioners have succeeded in the appeal, and it follows that the claimant must pay the costs of this appeal. As to the cases which have been cited to us, as shewing that a mandamus may go to the commissioners, I think they may be explained by pointing out that either the attention of the Court was not called to the question at all, or that when the point was called to the attention of the Court, the Court did not overrule the objection of the Crown, but said they would give an opinion inasmuch as the points had been fully argued before them. With regard to *Rex* v. *Lords Commissioners of the Treasury* (1), I confess it is a case with which I cannot agree. It is put upon the ground that a relation was established between the parties of depositor and depository, that is to say, although the money had been paid by the Crown into the hands of the Commissioners of the Treasury, it never having been the money of the claimant, yet the Com-

(1) 4 A. & E. 286.

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missioners of the Treasury by the acts which they had done, had, as in common law it would be called, attorned to the claimant and agreed to hold the money for him. The moment that they came to that conclusion, they shewed that he could have maintained an action for money had and received against the Commissioners of the Treasury, and if so, of course a mandamus ought not to have issued. I cannot agree, therefore, that upon the grounds put by the Court in that case it was a proper decision. If it were a decision which could be upheld, and I think it cannot, it is no authority for saying that where that relation has not been raised by the acts of such commissioners a mandamus would lie to them. How a mandamus could have lain to them if it had not been for that attornment, I cannot conceive. I must say frankly, that, sitting here, I consider that the case of *Rex* v. *Lords Commissioners of the Treasury* (1) cannot be maintained on any ground.

BOWEN, L.J. I also think that this appeal must be successful, and that the judgment of the Court below must be reversed with costs. This is a claim for the return of duty which has been paid to the Inland Revenue Commissioners in respect of probate, and the prosecutor has maintained that as he has paid debts out of the personal or moveable estate of the deceased person, he ought to have certain moneys paid back to him which he has paid over to the commissioners. It is maintained that he is entitled to have back moneys which, as administrator of the deceased person, he has paid over, and that there are in fact now in the hands of the Crown, or in the hands of the commissioners of the Crown, moneys which do not belong to the Crown at all, but to the estate of the deceased. The first difficulty that arises is this: the statute having enacted that where it is proved by oath and proper vouchers to the satisfaction of the commissioners that the executor or administrator has paid debts due and owing by the deceased, the duty is to be returned, is the executor or administrator of the deceased bound by the conclusion to which the commissioners come upon a claim being put forward for a return of a portion of the moneys which have

(1) 4 A. & E. 286.

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been paid? Is there any remedy at all if the commissioners choose not to be satisfied? I do not think that is a very easy point. There are many public bodies, it may be, by whose decision a claimant is bound, many executive bodies which a statute has constituted the sole judges, in particular instances, of what is to be done. But it is of course to be remembered upon the other side in the present matter, that it is not merely a claim which is being put forward to public moneys by an administrator, but the administrator actually maintains that his own moneys are in the hands of the Crown, and it would be very desirable to put such a construction upon the Act as would not conclude the prosecutor in every case, by the opinion of the commissioners. It may be that there is a mode of reviewing the decision of the commissioners, especially upon a point of law; but I will not decide, as far as I am concerned, any more than the Master of the Rolls has decided that point upon the statute. Assuming that the prosecutor is entitled to some remedy, and that he is not bound by what the commissioners have said, what is his remedy? The duty in the first instance has been paid over to the commissioners, but they have not retained it in their hands. It appears to be the practice that they pay over the money to the Crown; and although the statute requires them to make a return of the amount which ought to have been deducted in the first instance, but which has been paid to them until the claim of the prosecutor to have it returned to him is made good, there are two ways of construing that. It may be said that it makes it their duty to get back the money from the Crown, and when they have got it back from the Crown, to return it to the owner, which is by no means an unreasonable construction of the statute; or it may possibly be that the statute renders it a sort of duty on their part to pay back the amount which they have received in excess of what they ought to have received. A great many difficulties present themselves against the view which has been put forward by the applicant. It is by no means a common thing for commissioners who have public moneys in their hands to be made liable by statute to pay over those sums to claimants, because the result of such legislation would be, in many cases, to place it at the

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mercy of a jury to say how the executive functions of the department should be performed. While on the one side I quite admit that it is by no means convenient in a free country to make an executive department masters of the situation, it is equally inconvenient for purposes of administration to make a jury masters of the position. The second difficulty is this, that the commissioners have paid the money over to the Crown, and they may possibly not and probably will not, have funds in their hands applicable specially to the claim which is now being made upon them. In substance the moneys have been paid, not to the commissioners, but to the Crown. I therefore very much doubt whether under any circumstances, a mandamus could be the right remedy in this case; I will not, however, pronounce upon that point. But at all events a mandamus ought not to be granted if there is any other remedy. To my mind there is a clear remedy in a petition of right if the applicant is entitled to any remedy at all. The money is in the hands of the Crown, and there is an old constitutional way by which subjects of the Crown in this country are enabled to obtain back out of the hands of the Crown, either land, money or goods, upon which the Crown has laid its hands, and that is by the proceeding known as a petition of right. If that is the true view, then the petition of right would be the proper remedy in this case. But it being assumed for the purpose of argument, that which is possible as a matter of reasoning, that there may be a double resource in consequence of the construction of the particular statute, and that the prosecutor might be enabled to get back his money from the Crown by a petition of right, and also to maintain that a duty lay upon the commissioners to pay back the money to him, a duty imposed directly upon them by statute in addition to the general remedy that he might have against the Crown—ought a mandamus, in such a case to go? What is the origin of the right that any man has to ask the Court for a writ of mandamus? A writ of mandamus, as everybody knows, is a high prerogative writ, invented for the purpose of supplying defects of justice. By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of

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mandamus is granted to enable justice to be done. The proceeding, however, by mandamus, is most cumbrous and most expensive; and from time immemorial accordingly the Courts have never granted a writ of mandamus when there was another more convenient, or feasible remedy within the reach of the subject. It was not to his interest that it should be granted, and the reason for asking for it had ceased. A petition of right when the Crown is willing to grant its fiat is as good a means of getting justice against the Crown as any that could be conceived. All the procedure, or almost all the procedure can be applied to a proceeding by way of a petition of right that is available to the subject in an ordinary action against another subject; and there is no distinction at all in the case of a debt claimed against the Crown, so far as facility of procedure is concerned, between a petition of right and an ordinary action by one subject against another, except this, that the fiat of the Crown must be obtained before the Crown is harassed by a suit; but everybody knows that that fiat is granted as a matter, I will not say, of right, but as a matter of invariable grace by the Crown whenever there is a shadow of claim, nay, more, it is the constitutional duty of the Attorney-General not to advise a refusal of the fiat unless the claim is frivolous. Therefore, in this particular instance, where there is a bonâ fide case to be tried, there was not a shadow of reason for pretending from the first that there was the least danger that the fiat would not be granted. First of all, in the Court below the Attorney-General pointed out that a petition of right was the proper remedy in this case, thus indicating beyond all doubt that the Crown was not intending to oppose any application for a fiat; and before us the Attorney-General said in the clearest and most emphatic way, not merely that the fiat for a petition of right should be granted, but that he would do more than that, do what he was not bound to do, viz., offer the most favourable terms to the suppliant in this case, terms which would not only disengage the litigation between the prosecutor and the Crown from the long and cumbrous proceeding of mandamus, and substitute the more modern and compendious procedure under the Petitions of Right Act, 1860, but would

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actually relieve the subject from one of the main difficulties of the case, namely, the question of whether the opinion of the commissioners was to bind, or whether he should be allowed to review it by taking the opinion of the Court upon the point of law. Under those circumstances would it not be a monstrous thing to issue a mandamus, possibly to the wrong person, because it may well be that the commissioners cannot be made subject to a mandamus; and at any rate, even supposing they can, it appears to me that a mandamus to the commissioners, when really the question can be tried, and tried much more favourably to the subject, and on terms much less onerous to him by the petition of right, would be altogether wrong. So far, from saying that the prerogative writ of mandamus in this case is wanted to supply a defect of justice, it would be much more true to say that to grant it would be to create a defect of justice, because it would be to make it certain that this case would be tried without the means of arriving at the truth which the proceedings under the Petitions of Right Act, 1860, afford.

I agree with the Master of the Rolls in thinking that *Rex* v. *Lords Commissioners of the Treasury* (1) is a wrong decision.

Appeal allowed.

Solicitors for prosecutor: *Denton, Hall & Fox.*
Solicitor for defendants: *Solicitor to the Inland Revenue.*

(1) 4 A. & E. 286.

J. E. H.

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Nov. 27.

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 38, 51—*Costs—Verdict of Jury—"Sum previously offered."*

By s. 38 of the Lands Clauses Consolidation Act, 1845, the promoters of an undertaking, before issuing their warrant for causing a jury to be summoned in cases of disputed compensation, shall give not less than ten days notice of their intention to summon a jury to the other party, and in such notice shall state what sum of money they are willing to give for the interest in the lands sought to be purchased from him, and for the damage to be sustained by him by the execution of the works; and by s. 51, on every such inquiry before a jury where the verdict of the jury shall be given for a greater sum "than the sum previously offered" by the promoters, all the costs of the inquiry shall be borne by the promoters, but if the verdict be given for a less sum the costs shall be borne equally between the parties in the manner specified in that section.

In a proceeding to take and purchase the claimant's lands under the Lands Clauses Consolidation Act, 1845, the promoters, on the 9th of March, gave him the notice required by s. 38, and stated that they were willing to give him 600*l.* as and for purchase-money and compensation. On the 19th of March the promoters served a second notice upon the claimant that they were willing, and thereby offered, to pay 900*l.* as purchase-money and compensation. This notice did not refer to the previous one. Neither offer was accepted by the claimant, and on the 29th of March the promoters issued their warrant for causing a jury to be summoned, who assessed the sum to which the claimant was entitled at 750*l.*:—

Held, first, that in cases to which s. 38 was applicable the words "the sum previously offered" in s. 51 applied only to an offer made under s. 38; secondly, that the promoters were not entitled to rely upon their second offer of 900*l.* as an offer made under s. 38, and that the costs of the inquiry must, therefore, be borne by them.

RULE for a mandamus directing a master to tax the costs of an inquiry to assess compensation in a proceeding under the Lands Clauses Consolidation Act, 1845.

The affidavits used on the argument of the rule stated the following facts:—

On the 10th of January, 1883, the claimant Westfield was duly served with a notice, under s. 18 of the Lands Clauses Consolidation Act, 1845, from the joint committee of the Metropolitan and

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Metropolitan District Railway Companies (appointed under the Metropolitan and District Railways (City Lines and Extensions) Act, 1879), that the companies required to take certain lands belonging to the claimant, and were willing to treat with him for the same, and for the purchase-money and compensation to be paid in respect thereof.

Westfield, on the 2nd of February, 1883, claimed 1987*l.* from the companies as the purchase-money and compensation to which he was entitled.

On the 9th of March, 1883, the companies served a notice on the claimant under s. 38 of the Lands Clauses Consolidation Act, 1845, in which, after reciting the notice to treat of the 10th of January, and stating that no agreement with respect to the amount of compensation to be paid had been come to between the parties, the companies gave notice to the claimant of their intention to issue their warrant for summoning a special jury for the purpose of ascertaining the amount of such purchase-money and compensation, and the companies thereby offered the claimant the sum of 600*l.* as and for such purchase-money and compensation.

On the 19th of March, 1883, the claimant was served by the companies with a further notice, dated the 16th of March, 1883, which, so far as is material, was as follows:—

"Referring to the notice to treat, dated the 10th of January, 1883, served on you by the joint committee, and also to your notice of claim, dated the 2nd of February, 1883, and to the claim of 1987*l.* therein made by you, the joint committee hereby give you notice that they are willing, and hereby offer, to pay you the sum of 900*l.* as and for the purchase-money and compensation payable to you: And the said committee hereby give you notice that this offer is intended to be and is a formal offer under the Lands Clauses Consolidation Act, 1845."

The claimant did not accept either of the above-mentioned offers.

On the 29th of March the companies duly issued their warrant to the Mayor, &c., of the city of London to nominate, strike, and

reduce a special jury for the purpose of assessing the purchase-money and compensation to be paid by the companies to the claimant.

The inquiry was held on the 17th of April at the Mayor's Court, Guildhall, before the Recorder of the city of London and a special jury, and the jury assessed the amount of purchase-money and compensation to which the claimant was entitled at the sum of 750*l.*

Upon an application to a master, made on behalf of the claimant, to tax the costs incurred by him of and incident to the inquiry, the companies' solicitors objected that the claimant was not entitled to costs, having recovered by the verdict of the jury a less sum than that offered by the companies in their notice of the 16th of March, served on the 19th of March.

The master having declined to proceed with the taxation, this rule for a mandamus was obtained on behalf of the claimant.

H. Matthews, Q.C., and *Philbrick, Q.C.* (*Bickersteth*, with them), shewed cause. The question turns upon the meaning of the words "previously offered" in s. 51 of the Lands Clauses Consolidation Act, 1845. (1) It is submitted that the companies' second offer of 900*l.* made on the 19th of March, 1883, must be

(1) By s. 38 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), "before the promoters of the undertaking shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned, and in such notice the promoters of the undertaking shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works."

By s. 46: "Not less than ten days' notice of the time and place of the inquiry shall be given in writing by the promoters of the undertaking to the other party."

By s. 51, "on every such inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking; but if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking, . . . one-half of the costs of summoning, impanelling, and returning the jury, and of taking the inquiry and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the pro-

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taken to be the sum previously offered, and that the claimant is not entitled to costs. Although s. 38 requires the company to make an offer when notice of intention to summon a jury is given, they may still make an offer up to the time mentioned in s. 46, i.e., not less than ten days before the inquiry is held. The Courts have decided that the provisions of s. 51 apply to an inquiry under s. 68 to assess compensation for lands injuriously affected; and there are two decisions, in cases coming under s. 68, to the effect that a sum offered before ten days' notice was given of the time and place of the inquiry under s. 46 was a sum "previously offered" within the meaning of s. 51: *Metropolitan Ry. Co.* v. *Turnham* (1); *In re Hayward and the Metropolitan Ry. Co.* (2) In the latter case the Court held that an offer might be amended if the amending offer were made before the notice required by s. 46. Sect. 38 has been excluded by judicial decisions from applying to proceedings under s. 68, but it would seem to be a strange result if the period within which an offer could not be

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moters of the undertaking, and each party shall bear his own costs, other than as aforesaid, incident to such inquiry."

By s. 68: "If any party shall be entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice," &c. . . . "or if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters . . . stating such particulars as aforesaid, and unless the promoters . . . be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior Courts."

(1) 14 C. B. (N.S.) 212; 32 L. J. (M.C.) 249.

(2) 4 B. & S. 787; 33 L. J. (Q.B.) 73.

made under s. 38 differed from the period within which an offer could not be made under s. 68, although s. 51 applied to both sections. *Pearson* v. *Great Northern Ry. Co.* (1) appears to conflict with the two cases before mentioned, but the decision was merely that "the sum previously offered" in s. 51 primarily meant the sum to be offered under s. 38. The Court did not say that no further offer could be made. Admitting that an offer once made cannot be retracted, it may still be amended by offering more.

Crispe, for the claimant, supported the rule. When notice to treat is given by the promoters under s. 18, a complete contract is constituted between them and the person whose land they are purchasing. They cannot withdraw from that contract, but the question of the amount of purchase-money or compensation remains open. Then s. 38 in express terms provides that the promoters shall state in their notice of intention to cause a jury to be summoned the sum of money they are willing to give. The promoters cannot depart from that offer. The offer contained in the notice of the 19th of March, 1883, was clearly not made under s. 38, but was an offer based upon negotiations going on between the parties. The words in that notice, "this offer is intended to be and is a formal offer under the Lands Clauses Consolidation Act, 1845," are not authorized by the statute, and cannot have the effect of making the notice a good notice under s. 38. [He was stopped.]

LORD COLERIDGE, C.J. There are two modes of dealing with the construction of an Act of Parliament. One is to satisfy your own mind what it would have been reasonable for the legislature to enact, and then to force the words of the Act into compliance with your view; the other is to stand by the words, honestly trying to arrive at the meaning of the legislature, and to give effect to that meaning when ascertained. I prefer the latter mode. If by adopting it some unreasonable result or hardship is brought about, the legislature must be looked to for the remedy. So dealing with this Act, I think the meaning is reasonably clear;

(1) Reported in note to *Fitzhardinge* v. *Gloucester and Berkeley Canal Co.*, Law Rep. 7 Q. B. at p. 785.

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and I also think that the enactment is in itself fair and just. The facts upon which we have to give our decision are these:—The railway companies gave notice of their intention to take lands of the claimant under the Lands Clauses Consolidation Act, 1845, and proceeded on the 9th of March, 1883, to give him notice of their intention to cause a jury to be summoned for the purpose of assessing the purchase-money and compensation to be paid for his lands. That notice was given under s. 38, and stated, in compliance with the terms of the section, the sum which the companies were willing to give, and that sum was 600*l.* On the 19th of March, 1883, they served the claimant with a further notice, which is as follows:—[His Lordship read the notice.] Now if that could be treated as a notice given by the companies under s. 38, they would be right in their contention and the claimant wrong in his, because he did not accept their offer of 900*l.*; on the 29th of March the warrant was issued for summoning a jury; the trial took place on the 17th of April, and the jury gave a verdict for a sum exceeding the companies' offer of 600*l.*, but less than their offer of 900*l.* Therefore if the companies' offer of 600*l.* is to be treated as the sum "previously offered" which is referred to in s. 51, and if they are bound by that offer, the claimant is entitled to costs. If, on the other hand, the companies are entitled to rely upon the offer of 900*l.* as the sum "previously offered" within s. 51, then the costs must be shared between the parties in the manner specified in that section. I confess that, apart from judicial decisions, I should have thought the meaning of the Act very clear. In s. 38 the promoters of the undertaking are told by parliament that they "*shall state*," in their notice of intention to cause a jury to be summoned, what sum of money they are willing to give for the interest in the lands sought to be purchased. The present was a proceeding with respect to the purchase of lands to which s. 38 applies, and the companies did state in their notice the sum they were willing to give. Then s. 51 says that when a jury is summoned—"on every such inquiry before a jury"—where the verdict shall be given for a greater sum than "the sum previously offered" by the promoters the costs shall be borne by them. Apart from the decisions I should think that the true, obvious, and reasonable

construction was that "the sum previously offered" in s. 51 meant the sum required to be offered by s. 38. The promoters are taking a person's property adversely to his own benefit, and it does not seem an unreasonable thing that, before they are allowed to take from him that which he does not desire to part with, they should make him an offer by which they are bound to abide, and upon which he can take the advice of his surveyor, and come to a conclusion whether or not he will accept it or embark upon costly litigation with the promoters. I am disposed to think that if the notice of intention to cause a jury to be summoned coupled with the offer of the sum the promoters were willing to give were formally withdrawn, and another notice were given not less than ten days before the summoning of the jury, and another offer of a larger sum substituted in that notice, it would be a good offer under s. 38, and one upon which the promoters could rely with respect to the question of costs. I think so upon the reason of the thing, and because of the expressions of opinion upon the same subject by Blackburn, J., in *Fitzhardinge* v. *Gloucester and Berkeley Canal Co.* (1) It is not necessary to decide that question; I only state the inclination of my own opinion. But here the notice which it is suggested may be substituted for the one containing the offer of 600*l.* is not such a notice as I have described. It does not refer to the previous notice, nor withdraw the offer of 600*l.* The Act has undoubtedly been rendered more difficult to construe by decisions with respect to s. 68, which deals, not with cases in which the promoters give notice to take lands for the purposes of their undertaking, but with cases in which lands are injuriously affected by the carrying out of the undertaking, and there the person whose lands are so affected is himself to give notice to the promoters, and proceed to claim compensation under that section. Had the matter been res integra I should have thought the simpler and fairer construction would have been that the terms of s. 68 with respect to issuing a warrant for summoning a jury to assess disputed compensation for lands injuriously affected referred to the warrant to be issued under s. 38, and that the words "in the manner herein provided," which are

(1) Law Rep. 7 Q. B. at p. 785.

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found in s. 68, covered the mode of issuing warrants prescribed by s. 38. But the Courts, for reasons which have seemed good to them, have decided that, although by the terms of s. 68 the warrant is to be issued "in manner herein provided," the provisions of s. 38 must be rejected as inapplicable to proceedings under s. 68. It thus became necessary for the Courts to give some interpretation which would make s. 51 operate with respect to s. 68 in a way differing from but analogous to its operation with respect to s. 38. As an offer made under s. 38 had been excluded by judicial decisions from applying to cases of disputed compensation for lands injuriously affected under s. 68, the Courts were driven to find some other meaning for the words "the sum previously offered" in s. 51 as applied to a proceeding under s. 68, and after discussion it was finally decided that those words referred to an offer made by the promoters before giving the ten days' notice required by s. 46 of the time and place of holding the inquiry, and that the promoters were entitled to rely upon any offer made before that period as a good offer for the purposes of s. 51. These decisions upon s. 68 were rendered necessary by the previous decisions of the Courts to the effect that s. 38 did not apply to a proceeding under s. 68, but we have now to deal with a case to which s. 38 does apply. I have given my reasons for thinking that, when s. 38 does apply, the words "the sum previously offered" in s. 51 mean the sum offered under s. 38 and that sum only. I am confirmed in my view by the decision, after argument by eminent counsel, of a Court of very high authority in the case of *Pearson* v. *Great Northern Railway Co.* (1) That case is directly in point, and conclusive so far as this Court is concerned. Upon the true construction of the Act therefore, and upon the authority of that case, I am of opinion that the costs of the inquiry should be borne by the companies.

MATHEW, J. I am of the same opinion, and for the same reasons. In dealing with s. 68 the Courts were compelled to consider whether the provisions of s. 51 with respect to costs were applicable. Sect. 68 contains no provision as to costs, and

(1) Reported in note to *Fitzhardinge* v. *Gloucester and Berkeley Canal Co.*, Law Rep. 7 Q. B. at p. 785.

the proceedings under that section wholly differ from those to which s. 38 relates. It having been decided that s. 38 did not apply to cases under s. 68 of disputed compensation for lands injuriously affected, the Courts had to search for some provision as to the costs of inquiries held under the latter section, and they had recourse to s. 51. It then became absolutely necessary to fix some dividing line upon one side of which the promoters' offer of a sum for compensation should be made, and the Courts fixed that line at the time appointed by s. 46 for giving notice of trial. I entirely agree that "the sum previously offered" in s. 51 refers to the sum to be offered in the notice of intention to cause a jury to be summoned required by s. 38. It was said to be reasonable that the promoters should have power to amend their notice from time to time and increase their offer up to the time for giving notice of trial. I can see many excellent reasons why the legislature should have desired to bring the parties to an issue as soon as possible. I think it was intended that as soon as the promoters had made up their minds not to pay the compensation claimed, they should state what sum they were willing to give, and after ten days proceed to issue their warrant for summoning a jury.

Rule absolute.

Solicitor for claimant: *William Sharp.*
Solicitors for the companies: *Baxters & Co.*

W. A.

1884
Feb. 5.

DAVIS *v.* USHER.

Bill of Sale—Consideration, 30l.—15l. repayable on Demand—Immediate Demand—Bill of Sale Act (1878) *Amendment Act*, 1882 (45 *&* 46 *Vict. c.* 43).

A bill of sale expressed to be in consideration of 30*l.* of which 15*l.* is repayable on demand and the rest by monthly instalments, may, in the absence of evidence that the transaction is a sham, be valid, notwithstanding the Bills of Sale Act (1878) Amendment Act, 1882, s. 12, if 30*l.* is bonâ fide paid to the grantor, even although, at his own request, demand for 15*l.* is immediately made by the grantee, and it is at once returned to him.

Special Case. The plaintiff was a joiner and builder, and the defendant a money-lender.

The plaintiff in July, 1881, gave the defendant a bill of sale for 20*l.* on his furniture, which had since been satisfied.

On the 22nd October, 1883, the plaintiff applied to the defendant for a loan of 15*l.*, and offered as security a bill of sale on his furniture, when the defendant replied that he could not lend so small a sum as 15*l.* now on a bill of sale, as a new law had come into force, and he would not lend less than 30*l.*, but if the plaintiff had sufficient furniture he would lend him 30*l.* if he agreed to repay 15*l.* on demand and 15*l* by instalments. The plaintiff replied that he did not want as much as 30*l.*, yet if defendant would not lend less than 30*l.* he would borrow that amount; and the plaintiff inquired when demand would be made for the 15*l.*, the defendant replied that he could not say when he would make the demand for the 15*l.*, perhaps soon after the loan was granted, perhaps in a month, perhaps not for three, or six months, or longer.

The plaintiff having agreed upon the terms of the loan, the defendant took an inventory of the plaintiff's furniture, which was valued at 40*l.*

On the said 22nd of October, 1883, and in accordance with the arrangement already made, the plaintiff gave the defendant a bill of sale [Set out]. It was expressed to be "in consideration of the sum of 30*l.* now paid to the grantor," who covenanted to pay the aforesaid principal sum with interest then due, as follows:

"Fifteen pounds on demand and the balance by equal monthly payments."

The sum of 30*l.*, the consideration expressed to be paid to the plaintiff by the defendant on the execution of the bill of sale, was so paid in gold without any deduction, and the plaintiff put the same in his pocket. A card shewing the amount of the loan and the terms of repayment was given to the plaintiff by the defendant [Set out].

After the plaintiff received the said sum of 30*l.*, and as he was leaving the office of the defendant, the plaintiff said to the defendant, "You had better demand the money now and not bother me again about it, as I don't want it all." The defendant replied "Very well, I demand payment of 15*l.* due on demand in accordance with the bill of sale." The plaintiff thereupon paid 15*l.* to the defendant's clerk, and at the same time handed the defendant's clerk the card, and he then gave a receipt for the same to the plaintiff on the inside of the said card.

The plaintiff made default in payment of the instalments, and on the 8th of January, 1884, the defendant seized and took possession, under the powers of the bill of sale, of the goods and chattels assigned thereby for the balance and interest due.

The plaintiff paid it under protest, and brought an action of trespass for an illegal seizure.

The plaintiff contended that the bill of sale was void under, and nothing more than an evasion of, s. 12 of the Bills of Sale Act (1878) Amendment Act (1882). (1)

The defendant contended that the bill of sale was valid and good at law, the same having been given for a sum of 30*l.*, which was actually paid to and remained in the possession and under the control and subject to the disposition of the plaintiff.

The plaintiff and defendant were agreed upon the facts, and had entered into an agreement to stay the action and to state the special case.

The opinion of the Court was sought as to the validity of the bill of sale on the facts hereinbefore stated.

(1) By 45 & 46 Vict. c. 43, s. 12, every bill of sale made or given in consideration of any sum under thirty pounds shall be void.

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Fletcher, for the plaintiff. This transaction was a loan of 15*l.* and no more, and was a mere evasion of the Bills of Sale Act (1878) Amendment Act, 1882, which invalidates bills of sale for less than 30*l.* The consideration was not truly set forth: *Davis* v. *Burton*. (1)

Upjohn, for the defendant. The transaction was bonâ fide, and must, on the facts agreed to, be taken as real. 30*l.* was actually paid over to the borrower, who was entitled to go away with that sum, leaving the lender to enforce his security. If the property in the 30*l.* passed by the payment, that sum was the consideration for the bill of sale. The request by the borrower for an immediate demand could not have been collusive, as there is no evidence that the request was pre-arranged. Even if there was an evasion of the Act, the transaction is not void. Some statutes may be evaded without illegality, as Lord Selborne explained in *Macbeth* v. *Ashley*. (2) The Mortmain Acts and the Statute of Frauds are often evaded; and the former Bills of Sale Act was held to be successfully evaded by the fortnightly renewal of bills of sale: *Ramsden* v. *Lupton*. (3)

Fletcher, replied.

DAY, J. I think that the defendant is entitled to judgment. On the facts stated in the special case I do not see anything which will justify us in saying that the transaction was a sham. It may have been a sham, or may have been straightforward. The money-lender may not have wanted the money all paid by instalments, but may have wished to have a right to recall 15*l.* of it when he thought fit, having regard to the circumstances of the borrower, or the state of the security. There is nothing in the case inconsistent with that view. How can I infer a fraud and a sham when I find that it was not the money-lender who stopped the borrower as he was going out of the office with the money, but the borrower who turned to the lender, and said, "I do not want to keep the 15*l.*, so make a demand now and I will repay it and have done with it"? Not being satisfied on the facts that the transaction was a sham, I cannot hold it to be so.

(1) 11 Q. B. D. 537. (2) Law Rep. 2 H. L., Sc. 352, at p. 359.
(3) Law Rep. 9 Q. B. 17.

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SMITH, J. I am of the same opinion. The borrower says that the bill of sale was void because it was given for a consideration which was less than 30*l.* By consent of the parties the facts stated in the special case are to be taken as the facts. We are asked to say that the bill of sale was necessarily for a consideration below 30*l.*, and the real question is whether the bill of sale was in consideration of 15*l.* or 30*l.*, or, in other words, did the defendant lend to the plaintiff 15*l.* or 30*l.*? If the case had been tried by a jury much might have been said to shew that 15*l.* only was lent, and the jury would have been asked to decide whether the transaction was real or not. But on this special case we can only draw the inferences which ought to be drawn from the facts standing unimpeached. [The learned judge stated them.] We cannot say that the true inference from those facts is that the whole transaction was a sham. I think that as a matter of law—and even drawing the necessary inferences from the facts accepted as true—the bill of sale was not given in consideration of a sum under 30*l.*, and therefore that our judgment should be for the defendant.

Judgment for the defendant.

Solicitor for plaintiffs: *H. D. Henderson.*
Solicitor for defendant: *Thomas.*

J. R.

GRIFFITHS *v.* THE LONDON AND ST. KATHARINE DOCKS COMPANY.

March 25.

Master and Servant—Action for Negligence—Unsafe Premises—Knowledge of Master—Ignorance of Servant.

In an action of negligence brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew but that the servant was ignorant of the danger.

STATEMENT OF CLAIM: that the plaintiff was at the time of the accident hereinafter mentioned in the employment of the defendant company. On Saturday, the 25th of February, 1882, the plaintiff was lawfully in or near one of the warehouses of the Royal Albert Dock, the property of, and in the use and occupation

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of the defendant company, when one of the iron doors, being part of the permanent construction of the defendants' premises, without any warning gave way and fell with great force and violence upon the plaintiff.

The defendant company at the time of and previous to the plaintiff receiving the injury complained of knew or ought to have known of the defective, unsafe, and insecure condition of the said iron door, and it was altogether owing to the negligence of the defendant company that the same was not put into a safe and secure condition.

The plaintiff was hurt and claimed damages.

Objection of law: that the statement of claim was bad on the grounds, amongst others, that it did not shew any contract between the defendants and the plaintiff that the said door should have been in any condition other than the condition alleged, nor that the plaintiff was ignorant of its condition, nor any duty by the defendants towards the plaintiff in relation to the same.

Lush-Wilson, for the defendants. No breach of duty is shewn in the statement of claim. It does not allege with certainty that the master knew of the unsafe state of the door, and it is not alleged at all that the servant was ignorant of it. Non constat that he did not know the danger well and take the risk.

[He cited *Priestley* v. *Fowler* (1); *Seymour* v. *Maddox* (2); *Southcote* v. *Stanley* (3); *Holmes* v. *Clarke* (4); *Assop* v. *Yates*. (5)]

Fillan, for the plaintiff. The relationship of master and servant does not do away with liability for negligence causing damage. The statement of claim alleges that the door was defective, and the master knew it. It is not necessary to negative that which may be set up as a defence. It is for the defendants to allege that the plaintiff knew of the danger.

[He cited *Williams* v. *Clough*. (6)]

DAY, J. I am clearly of opinion that the defendants are entitled to judgment. The old form of declaration in such a case alleged

(1) 3 M. & W. 1.
(2) 16 Q. B. 326.
(3) 1 H. & N. 247.
(4) 6 H. & N. 349.
(5) 2 H. & N. 769.
(6) 3 H. & N. 258.

that the danger was known to the master and unknown to the servant. That seems to me a reasonable form of alleging a cause of action. If either of those allegations is omitted I think there is no cause of action. If a master employs a servant to do work for him, not knowing of any special or latent danger in the work, the servant takes the consequence of any danger there may be in it. The master does not mislead the servant, but only avails himself of his voluntary service. On the other hand, if the master knows of danger which the servant does not, it is clearly the duty of the master to communicate his knowledge of the danger to the servant. If the master requires the servant to do something out of the ordinary course of his employment and dangerous, the servant may disobey him. It is clearly the duty of the master to communicate a danger which he knows, and which the servant does not. It is necessary to allege that the servant does not know of the danger, because if the servant knows of the danger and does the act which may and does cause injury to him, he has nothing to complain of, and cannot bring an action for the damage sustained. He may be justified in declining to perform a particular act, not in the course of his employment; but, if it is in the course of his employment, he undertook to do that dangerous thing. Many employments are very dangerous, and the servants who enter into them are induced to do so by the wages to be earned. The master is liable if he is cognizant and the servant is not cognizant of danger. All that is alleged in this statement of claim is that the master "knew or ought to have known" of the unsafe state of their door, and it is also said that it was "altogether owing to the negligence of the defendant company"—not that the accident happened, but—"that the same was not put into a safe and secure condition." It is consistent with that allegation that the accident happened through the carelessness of the servant. Suppose that, altogether through the negligence of the masters, the door got into a decayed and dangerous state. Then suppose that the defendants knew it, and determined to put an end to the danger, and, calling their carpenter, told him that the door was in a dangerous state, and asked him to repair it at once. Accordingly the carpenter, whom we will suppose to be the plaintiff, fully knowing what he was

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about, went to remove the door and met with an accident. It could not be said that he would have an action, nor that it would be necessary for the defendants to plead that the plaintiff knew of the danger. The plaintiff must make out a cause of action in his statement of claim, and if he does not do so he must have judgment against him. *Williams* v. *Clough* (1) turned on a narrow question of special demurrer. But the declaration did set out in the plainest terms all that I have stated as necessary for the cause of action. It alleged that the defendant was possessed of a ladder unsafe and unfit for use, yet, "well knowing the premises, wrongfully and deceitfully ordered" the plaintiff, his servant, to carry corn up the ladder into a granary, and the plaintiff believing the ladder to be fit for use, "and not knowing the contrary," carried the corn up the ladder, and while so doing was hurt. There was an allegation enough to shew that the servant was acting in ignorance when he used the dangerous ladder, and it is not surprising that the Court held the declaration sufficient. But this statement of claim is very different, and I think that upon it the defendants are entitled to judgment.

SMITH, J. If a master knowingly puts his servant to work on that which is unsafe, whether it be plant, machinery, or premises, and the servant does not know it to be unsafe, and is hurt, he has a cause of action. But his statement of claim must aver two facts: first, that that which the servant was employed upon was unfit for the purpose; secondly, that the master well knew and the servant was ignorant of it. Because if the servant avers that the master knew and does not aver that he, the servant, did not know, what cause of action is there? As my Brother Day has pointed out, it is consistent with this statement of claim that the master, knowing the unsafe state of the door, directed the workman to make it safe, and the servant knew equally well the nature of the job. I am of opinion that the statement of claim is bad.

Judgment for the defendants.

Solicitors for plaintiff: *Bordman & Co.*
Solicitor for defendants: *W. M. Hacon.*

(1) 3 H. & N. 258.

J. R.

[IN THE COURT OF APPEAL.]

1884
March 27.

EX PARTE MAY. IN RE MAY.

Bankruptcy—Adjudication of Bankruptcy—Jurisdiction—Act of Bankruptcy committed before Commencement of Bankruptcy Act, 1883—*Liquidation Proceedings under Bankruptcy Act*, 1869—*Failure of Proceedings after 1st of January*, 1884—*Rehearing—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, 5, 94, 104, 169—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-s.* 12.

A debtor filed a liquidation petition in December, 1883, and a receiver of his property was appointed. On the 15th of January, 1884, the adjourned first meeting of the creditors was held, when the creditors separated without passing any resolutions, and without again adjourning the meeting. On the 21st of January one of the creditors presented a bankruptcy petition against the debtor under the Act of 1869, alleging the filing of the liquidation petition as an act of bankruptcy. On the 1st of February, the registrar adjudicated the debtor bankrupt on the petition. The debtor was present, and raised no objection to the jurisdiction of the Court to make the order. The receiver had not been discharged. On the 14th of March (*Ex parte Pratt*, ante, 334, having meanwhile been decided), the debtor applied to the registrar for a rehearing of the petition, and a reversal of the order of adjudication, on the ground that there was no jurisdiction to make it. The registrar refused the application:—

Held, that the Court had no jurisdiction to make the adjudication under the Act of 1869 on the ground that an act of bankruptcy had been committed, but that it would have had jurisdiction to make it under the power given by sub-s. 12 of s. 125 of that Act.

Held, therefore, that, as the objection had not been raised before the registrar, a rehearing ought not to be allowed.

Observations as to the exercise of the power to allow a rehearing.

Appeal from the refusal of Mr. Registrar Hazlitt to appoint a day for the rehearing of a bankruptcy petition on which an adjudication of bankruptcy had been made against J. V. May, a trader.

On the 12th of December, 1883, May filed a liquidation petition in the London Bankruptcy Court.

The first meeting of the creditors was held on the 28th of December, and was adjourned to the 15th of January, 1884. On that day the creditors again met, and separated without passing any resolutions, and without again adjourning the meeting. The liquidation proceedings having thus become abortive, one of the

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creditors on the 21st of January presented a bankruptcy petition against May, alleging as an act of bankruptcy the filing of the liquidation petition.

The petition was presented under the Bankruptcy Act, 1869, in accordance with a decision of Mathew, J. (sitting in chambers for Cave, J.), in *In re Carr* (1), that bankruptcy petitions under the Act of 1869, founded on acts of bankruptcy committed under that Act, might be received after the commencement of the Bankruptcy Act, 1883. In that case the act of bankruptcy alleged was the non-compliance with a debtor's summons issued before 1884 under the Bankruptcy Act, 1869.

The petition came on to be heard on the 1st of February. A receiver had been appointed under the liquidation petition, and had not been discharged. May appeared, but he took no objection to the jurisdiction of the Court to make an adjudication on a petition presented in this way.

The registrar adjudicated him a bankrupt, and he did not appeal from the order within the twenty-one days limited for that purpose. A few days after the 22nd of February he was advised that the effect of the decision of the Court of Appeal in *Ex parte Pratt* (2) decided on the 22nd of February, was to shew that there was no jurisdiction to make an adjudication against him under the Act of 1869. In consequence of this advice he, on the 14th of March, applied to the registrar to appoint a day on which he might apply to the Court for an order that the bankruptcy petition might be reheard and the order of adjudication discharged for irregularity, on the ground that, at the time of the presentation of the petition, the creditor's right to present it, and the liability of the debtor to be adjudicated a bankrupt, under the Act of 1869 had ceased, and that the petition and adjudication were wrongly filed and made. The registrar refused the application. The bankrupt appealed.

Cooper Willis, Q.C., and *F. Cooper Willis*, for the appellant. The Court has power to review any order: Bankruptcy Act, 1883, s. 104, sub-s. 1; and it has also power to extend the time for

(1) Jan. 18, 1884. Not reported.

(2) Ante, 334.

appealing: s. 105, sub-s. 4; and this is a proper case for its exercise: *Ex parte Brown* (1); *Ex parte Ritso.* (2)

It follows from *Ex parte Pratt* (3) that there was no jurisdiction to make the adjudication on a petition under the Act of 1869, though it could have been made under the Act of 1883. The right of a creditor to present a bankruptcy petition under the Act of 1869, founded on the act of bankruptcy committed by the filing of the liquidation petition, is not preserved by s. 169 of the Act of 1883. There were no bankruptcy proceedings pending on the 1st of January, 1884. Nor could an adjudication be made under the power given to the Court by sub-s. 12 of s. 125 of the Act of 1869, for the liquidation proceedings had come to an end before the adjudication was made. The appellant offered before the registrar to consent to an immediate receiving order under the Act of 1883, and, if necessary, to an adjudication under that Act.

Sidney Woolf, for the petitioning creditor. No doubt there is power to rehear, even though the twenty-one days limited for appealing from the order has expired: *Ex parte Geisel.* (4) But the power ought to be exercised with great caution. The question is of importance here, because the title of the trustee in the bankruptcy will relate back further under the Act of 1869 than under the Act of 1883. The mere fact that since the adjudication was made a different decision as to the law has been given by the Court of Appeal is not a sufficient reason for allowing a rehearing: *Craig* v. *Phillips.* (5) It is too late now for the bankrupt to be heard to say that there was no jurisdiction to make the order, for he appeared and took no objection to the jurisdiction, and he has since acquiesced in proceedings which had been taken under the adjudication, and he did not appeal from the adjudication within the proper time: *Ex parte West.* (6)

But the Court had jurisdiction to make the adjudication under the power conferred by sub-s. 12 of s. 125 of the Act of 1869. After the creditors had separated without passing any resolution, the liquidation proceedings were still pending to such an extent

(1) Law Rep. 9 Ch. 304.
(2) 22 Ch. D. 529.
(3) Ante, 334.
(4) 22 Ch. D. 436.
(5) 7 Ch. D. 249.
(6) 22 L. J. (Bkcy.) 71.

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as to enable the Court to exercise that power. The receiver had not been discharged: *Ex parte McHenry.* (1) This power is preserved by sub-s. 3 of s. 169 of the Act of 1883, and it could be exercised either upon a petition or upon a motion. This view is quite consistent with *Ex parte Pratt.* (2) The error, therefore, was a mere error in form; the adjudication could have been properly made under the Act of 1869, if a different form of procedure had been adopted, and, if the objection had been taken at the time, the proper form would no doubt have been followed. The error in form is cured by s. 82 of the Bankruptcy Act, 1869, or rule 208 of the Bankruptcy Rules, 1870, or by the corresponding s. 143 of the Bankruptcy Act, 1883, and rule 260 of the Bankruptcy Rules, 1883.

Cooper Willis, Q.C., in reply. The petitioner's own case is that the liquidation proceedings had absolutely fallen through; he cannot be allowed to go behind that.

[COTTON, L.J. Assume that the Court in making the adjudication acted on a wrong ground, and that, if the objection had been taken at the time, a right order could have been made, can you take the objection now?]

There was no jurisdiction at all to make an adjudication under the Act of 1869; the order is ex facie wrong, and therefore the objection can be taken at any time. There was no power to make an adjudication under sub-s. 12 of s. 125 of the Act of 1869. The term "pending proceedings" in sub-s. 3 of s. 169 of the Act of 1883, does not apply to a case in which there is no ground for saying that anything is pending, except the fact that the receiver has not been discharged. Moreover, sub-s. 12 does not apply at all when the liquidation proceedings are entirely at an end, and in the present case the Court did not purport to be exercising jurisdiction under that sub-section. If it had, the order would have been entitled "in the matter of the liquidation proceedings" instead of "in the matter of a bankruptcy petition." That cannot be remodelled now. The two matters are as distinct as a debtor's summons and a bankruptcy petition: *Ex parte Rogers.* (3)

(1) 24 Ch. D. 35. (2) Ante, 334. (3) 15 Ch. D. 207.

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COTTON, L.J. This is an appeal from the refusal of the registrar to rehear a bankruptcy petition, and to reverse an order of adjudication which he had made upon it. The objection is taken that no provision is made by the Act or the Rules as to the time within which an application for a rehearing is to be made, and that the application was made to the registrar in the present case after the time for appealing from the order had expired, and it is said that that is a fatal objection. Possibly, in our view of the present case, it is not necessary for us to decide this point. But I am unwilling that any doubt should be entertained as to the power of the Court to rehear. It is, however, a power which must be exercised with great caution, and it ought not to be used in order to extend the time for appealing. If the question were not one of jurisdiction, if for instance, the question had been whether the proof of a creditor had been rightly rejected, a question affecting only the right of the particular creditor, I should have thought the objection a fatal one. But here it is said that, having regard to s. 169 of the Act of 1883, there was no jurisdiction to make the adjudication. Now s. 169 repeals the Act of 1869 altogether, but it contains certain saving clauses. The only clauses which bear on the present case are sub-s. 2 (*b*) and sub-s. 3. Sub-s. 2 (*b*) provides that the repeal shall not affect "any right or privilege acquired, or duty imposed, or liability or disqualification incurred under any enactment so repealed." And by sub-s. 3, "Notwithstanding the repeal effected by this Act, the proceedings under any bankruptcy petition, liquidation by arrangement, or composition with creditors under the Bankruptcy Act, 1869, pending at the commencement of this Act shall, except so far as any provision of this Act is expressly applied to pending proceedings, continue, and all the provisions of the Bankruptcy Act, 1869, shall, except as aforesaid, apply thereto, as if this Act had not passed." In the present case, liquidation proceedings were pending under the Act of 1869 on the 1st of January, 1884, but they afterwards became inoperative by reason of the creditors separating without passing any resolutions. This put an end to the liquidation proceedings in this sense, that they could not afterwards, without some order of the Court, be made effective for the purpose of

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administering the debtor's property. But the receiver who had been appointed under the petition had not been discharged, and this kept the proceedings alive even for the purpose of enabling the Court to order a fresh first meeting of the creditors to be held. Then a creditor presented a bankruptcy petition, and on this petition the adjudication was made. I agree that the petition was founded on an act of bankruptcy having been committed by the debtor in the filing of the liquidation petition, and that the adjudication was not made under sub-s. 12 of s. 125 of the Act of 1869. It was an ordinary adjudication, made upon a petition founded on an act of bankruptcy, and the petition was presented under the Act of 1869. It is said, and I think rightly, that the order was made without jurisdiction, because the right of a creditor to present a bankruptcy petition under the Act of 1869 is not a right which is saved by sub-s. 2 (*b*) of the Act of 1883. This point we really decided in *Ex parte Pratt* (2). But here the debtor appeared and took no objection to the jurisdiction of the Court to make the order. And, in my opinion, if the Court then had power under the Act of 1869 to make the adjudication, if it had proceeded in another way, and there was good ground for making it, we ought not to allow a rehearing merely because the order was made in a wrong form, the objection not having been taken at the time. It is true that at that time there had been a decision as to the legal effect of s. 169, different from the subsequent decision of this Court in *Ex parte Pratt* (2), but I think we ought not, except under special circumstances, to allow a rehearing merely because, since the order complained of was made, there has been a different decision of the Court of Appeal on a point of law. The question, therefore, is, was there jurisdiction under the Act of 1869 to make the order of adjudication in another form? I am of opinion that, at the time when the order was made, the Court had jurisdiction to make it under the power conferred by sub-s. 12 of s. 125, and that the circumstances were such as to justify the exercise of that power. The liquidation proceedings had become ineffectual, by reason of the creditors having passed no resolution, and having separated without any further adjournment of the meeting. But, though the proceedings were in this

(1) Ante, 334.

sense at an end, they were still pending so as to authorize the Court to exercise jurisdiction, not only by directing another meeting of the creditors to be held, but by converting the proceedings into bankruptcy proceedings and adjudicating the debtor a bankrupt. I am of opinion that it was right under the circumstances to do this, and this would have been a "continuance" of the proceedings under the Act of 1869. Therefore, though the order was wrong on the ground on which it was made, yet, as it could have been made right in form, and the debtor, though he was present, did not take any objection to the form, I think he is not now at liberty to apply for a rehearing on the ground of this error in form. As *Ex parte Pratt* (1) has been referred to, I will add that what we there decided was this, that an independent proceeding by a creditor, by a petition founded upon an act of bankruptcy committed before the 1st of January, 1884, cannot now be taken under the Act of 1869, but that the creditor has a right to take it under the Act of 1883. The present appeal fails.

BOWEN, L.J. I am of the same opinion. This is in substance an application for a rehearing. I agree that we ought not lightly to rehear a case after the time for appealing from the original order has elapsed, or to encourage applications for rehearing. The present case is no doubt a strong one as it has been presented to us. The order for adjudication was made without jurisdiction, the proceeding to obtain it having been taken under the Act of 1869, which is now repealed. But the question is, whether the adjudication itself was one which the Court could not have had jurisdiction to make under the Act of 1869. Before the Act of 1883 came into operation, liquidation proceedings under the Act of 1869 were instituted by the debtor, and those proceedings were pending when the Act of 1883 came into operation. They afterwards came to an end, and then a creditor commenced a fresh proceeding by presenting a bankruptcy petition under the Act of 1869. It seems clear from our decision in *Ex parte Pratt* (1) that, though the act of bankruptcy was committed before the 1st of January, 1884, the creditor's proper course was to attempt

(1) Ante, 334.

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to obtain a receiving order under the Act of 1883. It was decided in *Ex parte Pratt* (1) that a receiving order could be made in such a case, and it follows, I think, that the Court had no power to make an adjudication under the Act of 1869, simply on the ground that an act of bankruptcy had been committed by the debtor before the 1st of January, 1884. But there is one kind of adjudication which, as was pointed out in *Ex parte Pratt* (1), might still have been made under the Act of 1869, i.e., when liquidation proceedings were pending on the 1st of January, 1884, and they are kept alive by sub-s. 3 of s. 169 of the Act of 1883, the Court has still the power, if it chooses to exercise it, of making an adjudication under sub-s. 12 of s. 125 of the Act of 1869. I think that was pointed out in *Ex parte Pratt* (1). So in the present case things stood in this position, the Court had no power to make an adjudication under the Act of 1869, simply because an act of bankruptcy had been committed while that Act was in operation, but the Court had still power under sub-s. 12 of s. 125, if it chose to do so, to convert the liquidation proceedings into bankruptcy proceedings by adjudicating the debtor a bankrupt. It is quite true that the Court, being misled by the previous decision in *In re Carr*, did make the adjudication on a wrong ground. But the Court would have had power, if it had chosen to exercise it (and it would no doubt have done so if its attention had been directed to the point), to make the very same adjudication under sub-s. 12 of s. 125, on the ground that liquidation proceedings were pending in which justice could not be obtained by the creditors unless they were converted into bankruptcy proceedings. If the point had been taken the Court could have clothed itself with jurisdiction to make the adjudication under sub-s. 12 of s. 125. I think the true ground of our present decision is this, that the debtor had no right to allow the Court, which could have exercised jurisdiction rightly, to exercise jurisdiction on a wrong ground, and then to come to the Court of Appeal and say, The Court below had no jurisdiction to make the adjudication against me. The answer to his appeal is, The Court had jurisdiction to make the adjudication

(1) Ante, 334.

if it had exercised it in the right form. It seems to me, therefore, that there is no ground for allowing a rehearing, and that the adjudication is valid.

FRY, L.J. I am of the same opinion. I think there can be no doubt that the Court had jurisdiction to rehear the petition, but I think that as a general rule the exercise of the power to rehear should be regulated by reference to the time which is limited for appealing, and so as not to give a new right of appeal. And, though this is not the ground of my decision, I will say this, that I think the lapse of time from the 22nd of February to the 14th of March has not been sufficiently accounted for. It has been pressed on us that there is a broad distinction between an order made without jurisdiction, and an order made simply on a wrong view of the law. It is not necessary to say what our decision would have been if there had been no jurisdiction whatever to make this adjudication, because I agree that, though the order was made wrongly, there was nevertheless jurisdiction to make it in another form. It appears to me that when the liquidation proceedings under the Act of 1869, which were pending on the 1st of January, 1884, subsequently came to an end, a receiver being still in existence, two courses were open to a creditor. He might treat the filing of the liquidation petition as an act of bankruptcy, and present a bankruptcy petition against the debtor founded on that act of bankruptcy, for according to *Ex parte Pratt* (1) this is an act of bankruptcy on which proceedings under s. 5 of the Act of 1883 can be founded. But there is an alternative mode of proceeding. The liquidation proceedings are kept alive by sub-s. 3 of s. 169 of the Act of 1883, and, if in these pending proceedings the circumstances referred to in sub-s. 12 of s. 125 of the Act of 1869 occur, the Court can adjudicate the debtor a bankrupt, in other words, can convert the liquidation proceedings into a bankruptcy. If the liquidation proceedings are saved, notwithstanding the repeal of the Act of 1869, the liquidation may, if circumstances justify it, be converted into a bankruptcy under that Act. And, in my opinion, in the present case the circumstances did justify this.

(1) Ante, 334.

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Therefore, though the Court proceeded on an erroneous footing, it had jurisdiction to make the adjudication if it had proceeded in the right way.

Appeal dismissed.

Solicitors for appellant: *Buchanan & Rogers.*
Solicitors for respondent: *Spyer & Sons.*

W. L. C.

March 27.

[IN THE COURT OF APPEAL.]

EX PARTE MATTHEW. IN RE MATTHEW.

Bankruptcy—Bankruptcy Notice—Bankruptcy Petition—Receiving Order—Conditional Payment of Debt within Seven Days after Service of Notice—Promissory Note—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

Within seven days after the service of a bankruptcy notice the debtor gave to the creditor a promissory note, payable two months after date, for the amount of the debt, which note the creditor accepted:—

Held, that, the note being a conditional payment of the debt, the creditor could not, during the currency of the note, avail himself of the bankruptcy notice to obtain a receiving order against the debtor.

THIS was an appeal by J. D. Matthew against a receiving order which was made against him on the 11th of March, 1884, by the Registrar of the Wandsworth County Court.

The order was made on a bankruptcy petition presented on the 16th of February, 1884, by C. T. Reid, in the name and on behalf of a firm of Matthew & Reid, in which he had been a partner. The firm consisted of Alexander Matthew and C. T. Reid, but they had dissolved partnership on the 29th of September, 1881.

The act of bankruptcy alleged in the petition was the failure of J. D. Matthew to comply with the requirements of a bankruptcy notice which Reid, in the name and on behalf of his late firm, had, on the 22nd of January, 1884, served on him. The notice was served in respect of a debt of 3818*l.*, for which the late firm had, on the 25th of May, 1883, recovered a final judgment against J. D. Matthew.

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On the 24th of January, 1884, J. D. Matthew gave to Alexander Matthew, on behalf of his late firm, a promissory note, payable two months after date, for 3880*l.* 10*s.* 7*d.*, the amount of the judgment debt with interest, and Alexander Matthew accepted the note on behalf of his late firm. The giving of this note was not communicated to Reid, who was on bad terms with his late partner, and he did not know of it until the petition was just coming on for hearing by the Registrar. The registrar refused to look at an affidavit of J. D. Matthew which proved the giving of the promissory note, and made a receiving order.

J. D. Matthew appealed.

Cooper Willis, Q.C., and *Herbert Reed*, for the appellant. After the acceptance of the promissory note, the creditors cannot be allowed to proceed with their bankruptcy notice.

[FRY, L.J. Is the giving of the promissory note payment of the judgment debt, or securing or compounding for it, within the meaning of s. 4, sub-s. 1 (g) of the Act?]

It is a payment in accordance with the agreement between the parties.

[FRY, L.J. The judgment requires a present payment in cash.

BOWEN, L.J. The promissory note was a conditional payment of the debt: *Currie* v. *Misa.* (1)

FRY, L.J. Must there not be an unconditional payment according to the judgment?]

The words "payment in accordance with the judgment," in sub-s. 1 (g) only mean payment of the amount in accordance with the terms of the judgment. A person who accepts a promissory note as payment of a debt is estopped from saying that it is not payment.

Sidney Woolf, for Reid, admitted that Alexander Matthew had authority to bind his late partner.

COTTON, L.J. I think that the receiving order must be discharged. The case stood in a very different position before the

(1) Law Rep. 10 Ex. 153, 163.

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registrar, for it appears that he did not look at the affidavit which was made to prove the giving of the promissory note. I do not think that was a right course, for the question whether an act of bankruptcy had been committed was one of fact, which, if it was disputed, could only be decided upon evidence of the facts. It now appears that the debtor had, within seven days after service of the notice, given the creditors in payment of the debt a promissory note payable two months after date. It is now admitted that the partner to whom the note was given had authority to accept it on behalf of his late firm. The effect of the acceptance of this note was a conditional payment of the debt. If a judgment creditor who has served a bankruptcy notice on his debtor chooses to accept from the debtor a promissory note or a bill of exchange as a conditional payment of the debt, he cannot, so long as the bill or note is current, be heard to say that the debtor has committed an act of bankruptcy by not paying the debt, or securing it, or compounding for it. The promissory note having been accepted as a conditional payment of the debt, the receiving order must be discharged.

BOWEN, L.J. I am of the same opinion. I think that a creditor who, after he has served a bankruptcy notice, takes from the debtor a bill of exchange or a promissory note for the debt, cannot, during the currency of the bill or note, obtain a receiving order. Till the bill or note is dishonoured, it must be treated as payment of the debt.

FRY, L.J. I agree.

COTTON, L.J. I wish to add that our decision might have been very different if an adjudication of bankruptcy had been made, for in that case the other creditors would have acquired an interest. But, as it is, I think we can discharge the receiving order.

Appeal allowed.

Solicitor for appellant: *C. R. Steele.*
Solicitors for respondent: *Spyer & Son.*

W. L. C.

EX PARTE SCHMITZ. IN RE COHEN.

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March 28.

Bankruptcy — Bankruptcy Notice — Receiving Order — "Final Judgment" — Order for Payment of Costs — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

The defendants to an action for the specific performance of a contract executed the deeds necessary to carry out the contract, and an order was then made by consent that, on the defendants paying the plaintiff's taxed costs of the action all further proceedings in the action should be stayed. The costs were taxed, and an order was made that the defendants should, on or before a day named, pay the taxed amount. Payment was not made within the time appointed:—

Held, that the order for payment was not a "final judgment," within the meaning of sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883, and that a bankruptcy notice could not be founded on it.

THIS was an appeal ex parte from the refusal of the Registrar of the Northampton County Court to issue a bankruptcy notice.

On the 12th of March, 1883, an action was commenced in the Chancery Division by F. Schmitz against M. C. Cohen and Arthur Cohen for the specific performance of an agreement by the defendants to take leases from the plaintiff of some land in Northamptonshire; to hire of the plaintiff certain plant, machinery, and goods on the land; and to take from the plaintiff an assignment of certain contracts for the supply of iron ore from the land. Some deeds to carry out the agreement had been prepared and settled for execution. On the 28th of March, 1883, the defendants executed the deeds, and, the main object of the action having been thus obtained, an order was, on the application of the plaintiff, made on the 13th of April, 1883, by Chitty, J., by which it was by consent ordered that, upon the defendants paying to the plaintiff her costs of the action, to be taxed as between solicitor and client, all further proceedings in the action should be stayed. The costs were taxed at 61*l.* 8*s.*, and on the 14th of February, 1884, another order was, on the application of the plaintiff, made by Chitty, J., that the defendants should, on or before the 18th of February, pay to the plaintiff the 61*l.* 8*s.*, and 7*l.* 7*s.* 10*d.*, her ascertained costs of the application. The costs not having been paid, the plaintiff, on the 25th of March, applied to the registrar for the issue of a bankruptcy

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notice to the defendants, founded on the order of the 14th of February, which she described in her request for the issue of notice as a "final judgment" against the defendants. The registrar refused to issue the notice, on the ground that that order was not a "final judgment" within the meaning of sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883. The plaintiff appealed ex parte.

Etherington Smith, for the appellant. The order of the 14th of February was a "final judgment," within the meaning of sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1884. It was made in an action, and it finally decided the rights of the parties. The words "final judgment" are not intended to be limited to that which is strictly a judgment; the test is whether the order is one which finally settles the dispute between the parties. In the present case the defendants, after action brought, complied with the plaintiff's demand, and so rendered a judgment unnecessary. The only question which remained for determination was who was to pay the costs of the action. *Ex parte Chinery* (1) is distinguishable, for there the order was not made in an action.

COTTON, L.J. I think the Registrar was right in refusing to issue the notice. Sub-s. 1 (g) of s. 4 says that a bankruptcy notice may be served by a creditor who has obtained a "final judgment" against his debtor. The only question is whether this order for the payment of the taxed costs of the action is properly described as a "final judgment" against the defendants. The question is, not whether it is a final order, but whether it is a "final judgment." Even if *Ex parte Chinery* (1) had not been decided I should have been of opinion, as I am now, that we ought to give the strict legal interpretation to the words of the section, unless there is anything in the context which shews that something different was intended. I am of opinion that the words mean a "final judgment" in an action, and I think there is nothing in the context to enlarge the meaning.

BOWEN, L.J. I agree. I think this case is covered by our

(1) Ante, 342.

decision in *Ex parte Chinery*. (1) This action has not been prosecuted to "final judgment." 1884

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FRY, L.J. I am of the same opinion. No words are better understood by lawyers than the words "judgment" and "order." There is no "judgment" in the present case, and the word "judgment" ought not to be construed as including "order" unless the legislature has said so.

Appeal dismissed.

Solicitors: *Roscoe, Hincks, & Sheppard.*

W. L. C.

WALKER *v.* THE BRADFORD OLD BANK, LIMITED. *April* 1.

Assignment of Debt or Chose in Action—Present or Future Balance at Bank—Notice of Assignment after Assignor's Death—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

By a deed of assignment all moneys then or thereafter to be standing to the credit of the assignor at a bank were assigned to a trustee, on trust for the assignor for his life, and after his death on other trusts. At the date of the assignment the assignor's balance at the bank was 48*l.*, at his death it was 217*l.* Notice of the assignment was not given to the bank until after the assignor's death. In an action by the trustee against the bank to recover the balance of 217*l.*:—

Held, that the bank, being a stranger to the assignment, could not set up the defence that it was voluntary and therefore invalid in equity; that the balance at the time of the assignor's death was a debt or legal chose in action within the meaning of s. 25, sub-s. 6 of the Judicature Act, 1873; that notice after the death of the assignor was sufficient; and that the plaintiff was entitled to recover.

THIS was a special case stated in an action brought to recover a sum of 217*l.* 8*s.* 3*d.*, the amount standing to the credit of the account of Robert Vincent Reynolds at the defendants' bank at the date of his death.

The following are the material statements contained in the special case.

By an indenture of settlement dated the 1st of March, 1881, and made between Robert Vincent Reynolds and the plaintiff William Walker, after reciting that Reynolds was possessed of (inter alia) money at his bankers the Bradford Old Bank,

(1) Ante, 342.

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Limited, and being desirous of disposing of (inter alia) the cash at his bankers, and all moneys which might thereafter come to his hands or be paid to him from any source whatsoever for the benefit of himself and two of his daughters, Louisa Ann Reynolds and Sarah Vincent Reynolds, had determined to assign and transfer the same to the plaintiff in manner and upon the trusts, intents, and purposes thereinafter declared, it was witnessed that in pursuance of such desire and intention, and in consideration of his natural love and affection for Louisa Ann Reynolds and Sarah Vincent Reynolds, he did thereby assign, transfer, and dispose of unto the plaintiff, his executors, administrators, and assigns (inter alia): "Fourthly, all moneys now or hereafter to be standing to the credit of the said Robert Vincent Reynolds in the books of or at the said bank at Bradford aforesaid called the 'Bradford Old Bank, Limited.' Fifthly, all moneys which from time to time may come into the hands of or be paid, or made payable to the said Robert Vincent Reynolds and all other the personal estate of the said Robert Vincent Reynolds which now or hereafter may come into the possession of, or in any way belong to or be owned and enjoyed by the said Robert Vincent Reynolds, and all the estate and interest of the said Robert Vincent Reynolds in, to, and out of the premises hereinbefore expressed to be hereby assigned, together with power to the said William Walker, his executors, administrators, and assigns, to sue and give receipts for all sums of money now due or hereafter to become due to the said Robert Vincent Reynolds in the name or names of the said Robert Vincent Reynolds, his executors or administrators, To have and to hold the said premises hereinbefore expressed to be hereby assigned unto the said William Walker, his executors, administrators, and assigns absolutely."

It was declared by the said indenture that the plaintiff should stand possessed of the premises thereby assigned "upon trust for the said Robert Vincent Reynolds during his life, and after his death upon trust for the use of the said Louisa Ann Reynolds and Sarah Vincent Reynolds in equal shares, to be disposed of and applied for the benefit of the said Louisa Ann Reynolds and Sarah Vincent Reynolds respectively, at such times and in such manner as the said William Walker, his

executors, administrators, or assigns, in his or their absolute discretion might think fit."

No notice was given to the defendants of the assignment in the lifetime of R. V. Reynolds.

R. V. Reynolds at the date of the said indenture had at the defendants' bank, an ordinary private banking account to which dividend warrants, cheques, and moneys were from time to time paid in the usual way, and upon which cheques were drawn. After the 2nd of November, 1882, no moneys were paid into the defendants' bank to the credit of the account.

R. V. Reynolds died on the 12th of December, 1882. No letters of administration to his personal estate were taken out, nor was any will proved. On the 2nd of February, 1883, the plaintiff gave the defendants express notice of the assignment contained in the indenture of settlement, and demanded payment of all moneys then standing to the credit of R. V. Reynolds at defendants' bank.

The amount standing to the credit of R. V. Reynolds on the 1st of March, 1881, was 48*l.* 4*s.* 3*d.*, and at the time of his death was 217*l.* 8*s.* 3*d.*

The defendants refused to pay the money to the plaintiff.

The questions submitted for the judgment of the Court were:—

1. Whether the indenture was a good and valid assignment of the money in the defendants' bank standing to the credit of R. V. Reynolds either at the date of the indenture or at the date of his death, or both.

2. Whether the money in the defendants' bank standing to the credit of R. V. Reynolds as aforesaid was the property of the plaintiff by virtue of the assignment contained in the indenture, and should be paid by the defendants to the plaintiff upon his receipt alone.

3. Whether the declaration of trust contained in the indenture was a good and valid declaration of trust of the same money in favour of Louisa Ann Reynolds and Sarah Vincent Reynolds, and whether such money should be paid to the plaintiff as trustee for them.

1884. Feb. 27. *T. L. Wilkinson*, for the plaintiff. The inden-

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ture of settlement of the 1st of March, 1881, is an absolute assignment of a debt within the meaning of s. 25, sub-s. 6, of the Judicature Act, 1873. (1) As to 48*l.* 4*s.* 3*d.*, the amount standing to the credit of the assignor at the date of the assignment, the point is perfectly clear, and the cases of *Brice* v. *Bannister* (2) and *Buck* v. *Robson* (3) shew that the rest of the money passed. The notice was in time, and was sufficient. The section says nothing as to when or by whom notice shall be given.

K. E. Digby, for the defendants. This case does not come within the words of the section. This is a voluntary assignment of an expectancy, and therefore would not have been enforced in equity before the Judicature Act: Story's Equity Jurisprudence, s. 1040 d.; *Holloway* v. *Headington* (4); *Jefferys* v. *Jefferys* (5). The law is not altered as to this point.

This is not an absolute assignment within the meaning of the Act: *National Provincial Bank* v. *Harle.* (6) It is not an "assignment of any debt or other legal chose in action," for the debt or chose in action must exist at the time of the assignment, or arise afterwards by virtue of a contract existing at the time of the assignment. It cannot be said that the section applies to all future debts: *In re Count D'Epineuil* (7); *Clements* v. *Matthews.* (8)

[WILLIAMS, J., referred to *Holroyd* v. *Marshall.* (9)]

The notice having been given after the assignor's death was too late. The bank could not safely pay this money to the

(1) 36 & 37 Vict. c. 66, s. 25, sub-s. 6: "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor . . ."

(2) 3 Q. B. D. 569.

(3) 3 Q. B. D. 686.

(4) 8 Sim. 324.

(5) Cr. & Ph. 138.

(6) 6 Q. B. D. 626.

(7) 20 Ch. D. 758.

(8) 11 Q. B. D. 808.

(9) 10 H. L. C. 191; 33 L. J. (Ch.) 193.

plaintiff without the consent of the personal representatives of the deceased.

T. L. Wilkinson, in reply, referred to *Kekewich* v. *Manning*. (1)

Cur. adv. vult.

April 1. The judgment of the Court (WILLIAMS and SMITH, JJ.), was read by

SMITH, J. This is an action brought by the plaintiff to recover from the defendants the sum of 217*l.* 8*s.* 3*d.*, being the amount standing to the credit of Robert Vincent Reynolds in their hands at the date of his death on the 12th of December, 1882. The facts are set forth in the special case herein, and need not be now repeated.

Three points were raised by the bank (the defendants) in answer to the plaintiff's claim. First, they alleged that the assignment of the 1st of March, 1881, under which the plaintiff claimed, was a voluntary assignment, and was not one which a Court of Equity would under all circumstances have enforced. Secondly, that at the date of the assignment the 217*l.* 8*s.* 3*d.* was no debt or other legal chose in action within the meaning of sub-s. 6 of s. 25 of the Act. Thirdly, that the notice of the assignment not having been given till after the death of the assignor, it was then too late to give it, and that it was therefore ineffectual.

As to the first point, although s. 25, sub-s. 6, of the Judicature Act, 1873, does not, in my view, give new rights, but only affords a new mode of enforcing old rights, still I am of opinion that the point now taken will not avail the defendants.

The assignment was executed on the 1st of March, 1881. The assignor died on the 12th of December, 1882. No person claiming under the assignment, and no person claiming under the assignor, and, indeed, no person having any interest whatever in the assignment, has ever taken any step to impugn it, and up to the present time it stands valid and unimpeached. I am of opinion that, this being so, it is not competent for a mere stranger to the assignment to successfully raise any point as to whether

(1) 1 De G. M. & G. 176.

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a Court of Equity would or would not enforce it, and I am of opinion, even if the point now taken by the defendants as to what the Court of Equity under the circumstances of this case would or would not do, be correct, that it is not open to the defendants, being mere debtors to the estate of the deceased assignor or to his assignee, now to attempt to impeach the settlement.

As to the second point, it is said that the assignment of the 1st of March, 1881, is not "an absolute assignment of any debt or other legal chose in action," within the meaning of s. 25, sub-s. 6, of the Act, because at the date of the assignment—

(*a.*) The 217*l.* 8*s.* 3*d.* was not an existing debt;

(*b.*) No right arising out of contract then existed between the assignor and the defendants;

(*c.*) No legal chose in action then existed, and therefore there was nothing capable of being then assigned.

To this I answer that it seems to me that the cases of *Brice* v. *Bannister* (1) and of *Buck* v. *Robson* (2) decide that if an accruing debt arising out of contract be assigned, though not due at the date of assignment, such assignment satisfies the provisions of sub-s. 6 of s. 25 of the Act of 1873.

In the present case what has been assigned, to use the words of the indenture of assignment, is "All moneys now or hereafter to be standing to the credit of the said Robert Vincent Reynolds" (the assignor) "in the books of or at the said bank at Bradford, aforesaid, called the Bradford Old Bank, Limited." It was conceded in argument by the defendants that the moneys thereafter paid into the bank to the credit of the assignor were capable of being the subject-matter of contract: *Holroyd* v. *Marshall* (3), and I am of opinion that before and at the date of the assignment, and as long as the relation of customer and banker continued between the assignor and the bank, the ordinary relation of debtor and creditor existed between them (with the superadded obligation on the bank's part to honour the assignor's cheques, which is immaterial to the point under consideration), and that consequently there existed a contract on the bank's part to pay

(1) 3 Q. B. D. 569, and in C. A. at p. 575. (2) 3 Q. B. D. 686.
(3) 10 H. L. C. 191.

over on demand to the assignor all moneys then or thereafter standing to his credit. It seems to me, therefore, in this case, that at the date of the assignment there was an accruing debt arising out of contract, and consequently that this point also fails the defendants.

As to the third point, it is said by the defendants that by sub-s. 6, of s. 25 of the Act of 1873, the notice to be given to the debtor must be given in the lifetime of the assignor. In the first place I answer that there is no such limit of time mentioned in the section. It is not stated by whom the notice is to be given, but the effect of not giving it is to let in all equities which may exist or be created prior thereto.

It is then said that the legal right to the debt or chose in action is only passed to the assignee from the date of the notice, and that therefore the notice must be given in the lifetime of the assignor, for otherwise the legal right would upon his death vest in his personal representatives, and not pass to the assignee. I do not adopt this contention. In my view the meaning of the sub-section is, that until the assignee has given the prescribed notice, he would have to sue as he would theretofore have sued; but when the notice is given then he may bring an action at law in his own name without being incumbered with having to sue in the name of the assignor, or of having to make him a party to the action.

I am therefore of opinion that the defendants' points fail, and the plaintiff is entitled to judgment, and with costs.

My Brother Williams agrees in the result of this judgment.

Judgment for the plaintiff.

Solicitors for plaintiff: *Indermaur & Brown, for R. Newton Rhodes, Bradford.*

Solicitors for defendants: *Paterson, Snow, Bloxam, & Kinder, for W. F. Atkinson, Bradford.*

A. M.

1884
April 3.

INGLE *v.* M'CUTCHAN.

Practice—Bill of Costs—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*Assignee—Signature—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

A solicitor assigned his bill of costs and the right to recover on it, and the assignee gave notice of the assignment and delivered the bill to the party to be charged inclosed in a letter signed by himself. After the expiration of a month he brought an action in his own name on the bill of costs:—

Held, that the plaintiff was an assignee within s. 37 of the Solicitors' Act, 1843, and was entitled to maintain the action.

MOTION for a new trial in an action tried at the Mayor's Court of London.

The action was brought to recover the amount of a bill of costs for professional work done by a solicitor of the name of Kent for the defendant.

The bill of costs and the right to recover on it were duly assigned by Kent to the plaintiff, and notice given to the defendants of the assignment. Kent did not sign the bill of costs, but the plaintiff more than a month before action delivered the bill inclosed in a letter signed by himself. These facts having been opened by the plaintiff's counsel, it was objected that the plaintiff was not an assignee within the meaning of 6 & 7 Vict. c. 73, s. 37, and that consequently the provisions of that statute as to delivery of a signed bill had not been complied with. The judge of the Mayor's Court took that view and nonsuited the pliantiff.

The statute 6 & 7 Vict. c. 73, s. 37, enacts, "from and after the passing of this Act no attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements, and which

bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name, or with the name or style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be inclosed in or accompanied by a letter subscribed in a like manner referring to such bill. . . . ."

Candy, for the plaintiff. There is nothing in the Act itself to restrict the term " assignee " to an assignee in bankruptcy. The term is applicable to the plaintiff, and although as assignee of a chose in action he could not have sued in his own name before the Judicature Act, 1873, he can now do so under s. 25. The point, though not directly decided in *Penley* v. *Anstruther* (1), is dealt with by Pearson, J., who was of opinion that such an assignee as the plaintiff was within the terms of the Act.

A. Cock, for the defendant. The nonsuit was right. The statute deals with the persons who can commence and maintain an action, and the only persons who can do so are there named. They are all persons having legal rights, and among them is the assignee of a solicitor, which must mean assignee in bankruptcy, and in no other statute of or about that date has the word any other meaning. Here it is sought to make the word include the assignee of a chose in action who before the Judicature Acts could not have brought an action in his own name, and consequently could not have been contemplated as a person who was to sign a bill of costs. Further, there was no debt which the solicitor could assign till he was in a position to recover a debt himself, that is till he had complied with the conditions imposed by the statute; and as he never delivered a signed bill the assignment was not one that comes within the terms of s. 25, sub-s. 6, of the Judicature Act, 1873, as an absolute assignment of a debt or other legal chose in action.

Candy did not reply.

MANISTY, J. This is an action brought by the plaintiff to recover the amount of a bill of costs due originally to one Kent,

(1) 52 L. J. (Ch.) 367.

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a solicitor, in respect of fees, charges, and disbursements for legal business done by him for the defendant. But for what has taken place between the plaintiff and Kent the latter would have been the proper person to bring the action, but he has assigned his right to recover his fees, charges, and disbursements to the plaintiff, who has delivered a signed bill, that is a bill signed by himself, and now brings this action. The question is whether he can maintain it, seeing that no bill of costs signed by Kent has ever been delivered. As between Kent and the defendant I think it clear that there was a debt due from the latter which the former had a right to recover. If there were no such statute in existence as the 6 & 7 Vict. c. 73, there would be a right to sue for that debt, and all that statute did was to impose on attorneys and solicitors certain terms or conditions. The statute does not say that the fees, charges, or disbursements are not a debt, but it imposes certain conditions before it can be enforced and postpones the power of enforcing it. (1) Before the Judicature Act there was no law to prevent an attorney or solicitor from assigning such a debt, but the assignee had no right at law to maintain an action in his own name; he would, I apprehend, have sued in the name of the assignor. The objects with which 6 & 7 Vict. c. 73, was passed are stated in *Engleheart* v. *Moore* (2) by Alderson, B., to be that the client may have a full opportunity of ascertaining whether the business was done, and whether the charges are reasonable, and be advised as to the propriety of having the bill taxed. All these objects are obtained, so far as the client is concerned, by the assignee of the right of action delivering the bill just as much as by the solicitor or attorney delivering it. I cannot see, therefore, why before the Judicature Act it should not have been sufficient for the assignee to deliver a bill signed by himself and to sue in the name of the solicitor, while since the Judicature Act he may sue in his own name. Therefore on principle, and having regard to the objects of the Act 6 & 7 Vict. c. 73, I think the plaintiff is entitled to bring the action, while, if authority is necessary, we have that of Pearson, J., in *Penley* v. *Anstruther* (3), who, though the exact point does not seem to have been raised, expressed a

(1) See *Lester* v. *Lazarus*, 2 C. M. & R. 663.

(2) 15 M. & W. 548.

(3) 52 L. J. (Ch.) 367.

view inconsistent with limiting the term "assignee" to an assignee in bankruptcy.

WILLIAMS, J. I am of the same opinion. It seems to me clear that the nonsuit was erroneous. The plaintiff was assignee of this bill of costs in such a manner as primâ facie to come within s. 25 of the Judicature Act, 1873, so as to be enabled to sue in his own name to recover the amount. He delivered a signed bill signed by himself, or, what is equivalent, inclosed the bill in a letter signed by himself. It was objected that the provisions of 6 & 7 Vict. c. 73, s. 37, had not been complied with, because inasmuch as at that time there was no such person as an assignee in the position of the plaintiff the Act could not be taken to include him. This seems to me a fallacy, and the true position seems to be, that the Judicature Act has placed the plaintiff in the position that, as assignee of the right of action, he can sue for the amount of the bill of costs in his own name, subject, however, to the provisions of 6 & 7 Vict. c. 73, under which he must deliver a signed bill one month before action. If the plaintiff cannot sue it would seem to come to this, that no one is in a position to sue for these costs, for Kent has assigned his right of action, and is not the person suing, and the general result would be that the right to recover a bill of costs could never be assigned. Looking to principle, s. 37 of the Act 6 & 7 Vict. c. 73, is equally applicable to an assignee who can now for the first time sue in his own name, as to an executor or administrator who could always do so. I will only add that, apart from the reasons I have given why the non-suit was wrong, I think that we are bound by the decision of Pearson, J., in *Penley* v. *Anstruther* (1), which seems to be in point.

Order absolute for new trial.

Solicitor: *The plaintiff in person.*
Solicitors for defendant: *Rooks & Co.*

(1) 52 L. J. (Ch.) 367.

A. M.

1884
April 5.

[CROWN CASE RESERVED.]

THE QUEEN *v.* CARTER.

Criminal Law—Receiving Stolen Goods—Evidence—Guilty Knowledge—Prevention of Crimes Act, 1871 (34 & 35 *Vict. c.* 112), *s.* 19.

Upon the trial of a prisoner for receiving stolen property with a guilty knowledge, evidence was admitted that shortly before the stealing of the property in question he had been in possession of other stolen property of a similar character, though he had parted with the possession of such other property before the date of the stealing of the property charged in the indictment:—

Held, by the Court (Lord Coleridge, C.J., Hawkins, Stephen, Williams, and Mathew, JJ.), that such evidence was inadmissible, and did not fall within the words of s. 19 of the Prevention of Crimes Act, 1871.

THE following case was stated for the consideration of this Court by the chairman of the quarter sessions for Essex.

"At the adjourned quarter sessions for Essex, held at Chelmsford, the prisoner Carter was indicted for stealing a mare, the property of Alfred Smith, on the 20th of May, 1883, and the indictment contained a second count in the usual form for receiving the same animal well knowing it to have been stolen. It was proved that Carter was in possession of the mare almost immediately after it was stolen, he having sold it on or about the 26th of May, 1883. Evidence on behalf of the prosecution, to the effect that another mare, the property of Harry Broyd, which had been stolen on the 22nd of October, 1882, and for which a man named John Tolson had been convicted, was in the possession of Carter and sold by him on the 9th of May, 1883, was tendered on the second count of the indictment under the first paragraph of s. 19 of the Prevention of Crimes Act, 1871, which is as follows: "Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the

proceedings taken against him." It was contended on behalf of the prisoner that this evidence was inadmissible, inasmuch as Broyd's mare was not found in the possession of the prisoner at the time of his possession of Smith's mare, he having previously disposed of it.

Counsel for the prosecution contended that if such other property stolen within the preceding twelve months was found in the prisoner's possession at any time during the said twelve months, the evidence of such fact was admissible, and the Court decided to admit it, and to reserve the question for the opinion of this Court. The prisoner was convicted of stealing and not of receiving the mare, and was sentenced to seven years penal servitude and committed to Chelmsford Prison.

The question for this Court was, Was the evidence as to Broyd's mare having been in the prisoner's possession admissible under the section of the Act before referred to?

Wedderburn, for the prisoner, contended that the evidence was inadmissible apart from the section, and that *Reg.* v. *Oddy* (1), a case decided before the enactment relied on, was a distinct authority to that effect; and that the above section did not apply, because the mare first stolen was not "*found*" in the prisoner's possession at the same time with the mare the subject of the indictment, or indeed "*found*" in his possession at all. He also cited and relied on *Reg.* v. *Drage*. (2)

Grubbe, for the prosecution, argued that the section applied if the accused had at any time any property stolen within the previous twelve months in his possession, and that the mare first stolen was thus "*found*" in the prisoner's possession. He also cited *Reg.* v. *Harwood*. (3)

LORD COLERIDGE, C.J. I am clearly of opinion that this evidence was improperly received. The case of *Reg.* v. *Drage* (2) is directly in point and was in my opinion rightly decided, the facts in that case are almost identical with the present, and Bramwell, L.J., there held the case not within the words of the Act of

(1) 20 L. J. (M.C.) 198; 2 Den. C. C. 264. (2) 14 Cox, C. C. 85.
(3) 11 Cox, C. C. 388.

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Parliament, and he declined even to reserve the point for consideration. His decision was a right one and is decisive of the present matter.

HAWKINS, J. I am of the same opinion. The prisoner was in possession of the mare first stolen in the month of May, but before the crime the subject-matter of the present indictment was committed. I cannot think that a case falling within the section relied on; the true construction of the section appears to me to be that of Bramwell, L.J. If you find other stolen property in the possession of the person charged as a receiver at the same time that you find the property with regard to which you are charging him with receiving, you can prove that you did so find such property if it be property stolen within twelve months preceding. I do not mean to say that you must find the property the subject of the indictment and the property with regard to which you are seeking to give evidence at the same identical moment. It would be enough I should say if a police constable after finding one quantity of stolen property took it away with him and then came back to the premises of the accused where he had found the first lot for a further search, and on such search succeeded in finding there more stolen property, stolen within the required period, that is substantially a finding at the same time, but here in the present case there is nothing of the kind.

STEPHEN, J. I am of the same opinion. *Reg.* v. *Drage* (1) was rightly decided and is completely in point.

WILLIAMS, J. According to the proper construction of the section in question, and also according to reason and common sense, the evidence was improperly admitted.

Conviction quashed.

Solicitors for the prosecution: *Haynes & Clifton, Romford, Essex.*

Solicitor for the prisoner: *John W. Atkinson, Stratford.*

(1) 14 Cox, C. C. 85.

1884
March 5.

RANDALL *v.* LITHGOW,

AND

THE EQUITABLE FIRE INSURANCE CO., Garnishees, and GREEN and Another, Claimants.

Practice—Attachment of Debts—Garnishee Order absolute on Default of Appearance—Unliquidated Claim—Subsequent Award—"Debt" attachable—Judicature Act, Order XLV. r. 1*—Assignment—Interpleader.*

A claim on a fire policy having been made against an insurance company for unliquidated damages, the plaintiff, a judgment creditor of the assured for 127*l.*, duly served an ex parte garnishee order, under Order XLV. rule 1, on the company, attaching all debts owing or accruing from them to the assured. The company did not appear to shew cause against it, and the order was made absolute. An award on the claim was afterwards made of 248*l.* due to the assured, who assigned it to trustees for his creditors. The plaintiff demanded payment under his garnishee order of 127*l.* out of the sum payable by the company, and threatened them with execution, and the trustees claiming the 248*l.*, the company took out an interpleader summons on which an order was made directing the sum of 127*l.* to be paid into Court, and an issue to be tried as to whether that sum was the property of the plaintiff or the trustees.

On appeal:—*Held*, that although no attachable debt was in existence at the date of the garnishee order, yet it, not having been set aside, entitled the plaintiff to issue execution for 127*l.*, and that the interpleader order was wrong.

Appeal from Chambers.

The case was stated in the judgment of the Divisional Court (Denman, Manisty, and Williams JJ.) as follows:—

This was an appeal by the plaintiff against an order made by the judge at chambers directing the sum of 127*l.* 5*s.* 6*d.* received by the plaintiff from the Equitable Fire Insurance Company, the garnishees, to be paid into Court, and directing an issue to be tried between Lithgow, the defendant, and Green and Jebbutt, the claimants, to try the question whether the said sum paid into court is the property of the plaintiff or the claimants. The facts of the case, which are certainly peculiar, are as follows. On the 29th of March, 1883, the plaintiff Randall recovered judgment against the defendant Lithgow for 127*l.* 5*s.* 6*d.* Thereupon Randall, upon affidavit stating that the Equitable Fire Insurance Company were indebted to his judgment debtor Lithgow in the sum of 1500*l.*, obtained the usual ex parte order under Order XLV. rule 1, attaching all debts owing or accruing from

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the insurance company to the judgment debtor to answer the judgment debt, and ordering the insurance company, as garnishees, to attend on a certain day and shew cause why they should not pay to the judgment creditor, Randall, so much of the debt due from them to the judgment debtor as might be sufficient to satisfy the judgment.

This order was duly served upon the insurance company, and they did not appear to shew cause against a final order for judgment, accordingly on the 7th of April, 1883, an order absolute was made in the common form under Order XLV. rule 3, directing the insurance company as garnishees to pay forthwith to the plaintiff the debt due from them to the judgment debtor, or so much thereof as might be sufficient to satisfy the plaintiff's judgment debt, and that in default thereof execution might issue for the same. This it will be seen was an absolute order upon the insurance company to pay to the plaintiff the sum of 127*l.* 5*s.* 6*d.* out of the debt which they did not dispute to be due and payable from them to Lithgow, the judgment debtor, and upon which the plaintiff might have issued immediate execution. The plaintiff however took no immediate steps to enforce this order and made no further demand upon the insurance company until after the 14th of December, 1883. On the 14th of December, 1883, an award had been made in favour of Lithgow, the judgment debtor, for 248*l.* 2*s.* 11*d.* against the insurance company in respect of a claim made by him upon a fire policy.

The plaintiff, after the making of this award, pressed his claim under the garnishee order of the 7th of April upon the insurance company, and demanded payment from them of the sum of 127*l.* 5*s.* 6*d.* out of the sum of 248*l.* 2*s.* 11*d.* awarded to Lithgow under the said award. Such in fact was his claim. The insurance company however objected to pay the plaintiff upon the ground that the whole 248*l.* 2*s.* 11*d.* was claimed by Messrs. Green and Jebbutt under an assignment to them by Lithgow, and the plaintiff still persisting in his claim, and threatening to issue execution, the insurance company, upon the 8th of January, 1884, took out a summons entitled in the action of *Randall* v. *Lithgow*, with themselves as garnishees and Green and Jebbutt as claimants, calling upon all parties to appear and state the nature and

particulars of their respective claims to the moneys the subject matter of that action. No attempt was at any time made by the insurance company to set aside or vary the garnishee order of the 7th of April, which remains unimpeached to this day. The parties attended before the Master upon the hearing of the summons of the 8th of January. The affidavit on the part of the insurance company in support of that summons set forth that in October, 1878, Lithgow, the defendant, effected with the company a fire insurance policy for 1500*l.*; that in March, 1883, a fire took place upon Lithgow's premises, and caused certain damage to the goods covered by the policy; it then proceeded to state the judgment obtained by the plaintiff Randall against Lithgow on the 29th of March, 1883, for 127*l.* 5*s.* 6*d.*, and the garnishee order obtained by the plaintiff against themselves on the 7th of April; it further proceeded to state that by deed of the 11th of April, 1883, Lithgow assigned, inter alia, all his claim upon the policy to Messrs. Green and Jebbutt as trustees for the benefit of his creditors, and further, that an agreement was entered into on the 30th of June, 1883, between the insurance company and Lithgow and Green and Jebbutt referring to arbitration all disputes and differences respecting the damage to the said goods; and further, that the arbitrator in that arbitration made his award on the 14th of December, 1883, awarding to Lithgow 248*l.* 2*s.* 11*d.* as damages recoverable under the aforesaid policy, and directing the sum to be paid by the insurance company to him or his assignees, Green and Jebbutt; the affidavit concluded by stating that the plaintiff Randall claimed payment of 127*l.* 5*s.* 6*d.* pursuant to the garnishee order of the 7th of April, out of the sum of 248*l.* 2*s.* 11*d.*, and threatened to issue execution, and also that Green and Jebbutt demanded payment of the 248*l.* 2*s.* 11*d.* to them.

This summons was dismissed by the master, whereupon the plaintiff pressed his demand and threatened to issue execution, and the insurance company, under pressure of this threat and under protest, paid the plaintiff 127*l.* 5*s.* 6*d.*, and gave notice of appeal from the master's decision to the judge, and the judge reversed the decision of the master and made the order now appealed from, ordering the plaintiff to pay the 127*l.* 5*s.* 6*d.*, into Court to abide further order, and ordering that the plaintiff Randall and

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RANDALL v. LITHGOW.

the claimants Green and Jebbutt should proceed to the trial of an issue whether the sum of 127*l.* 5*s.* 6*d.* paid into Court was the property of the claimants Green and Jebbutt, or of the plaintiff Randall, and which of them is entitled thereto.

Feb. 25. *Bankes*, for the plaintiff. The defendant had no right to assign. While the garnishee order stands the Court will deem it good. The company cannot now be heard to say that at the date of the order there was no "debt" attachable. They should have appealed against the order to have raised that point.

A "debt" certainly arose before the interpleader order. No payment but a payment made by compulsion of law can discharge a garnishee from his original liability to his creditor: *Mayor, &c., of London* v. *London Joint Stock Bank.* (1) But a payment under the garnishee order would be a good payment, and an absolute protection, Order XLV., rr. 3, 5, 6, 7. It was the duty of the company to pay over the sum affected by the order, and having paid it over they would not be in a position to interplead. They would not be "under liability" within Order LVII.

It is essential to interpleader that the fund should be in the hands of the person seeking relief.

Reginald Brown, for the garnishees. There is no estoppel against the garnishees because of their non-appearance, and the plaintiff did not act on it to his prejudice. The garnishee order was obtained on an affidavit which was, in fact, untrue as to indebtedness.

No "debt" existed at the date of the order. A debt must be owing to a certain person, and not to one or another. Nor was there any debt accruing. The company are threatened with an execution by the judgment creditor, and an action by the assignees and are entitled to interplead.

McColl, for the claimants. If this was not a debt at the date of the garnishee order the assignees must succeed.

Bankes, replied.

Cur. adv. vult.

March 5. WILLIAMS, J. (after stating the facts as above set

(1) 6 App. Cas. 393.

forth). The question now is whether the interpleader order is correct. In determining this question some things may be considered as clear. In the first place, it is clear that the claim of the judgment debtor Lithgow against the insurance company, which resulted in an award in his favour on the 14th of December, 1883, for 248*l.* 2*s.* 11*d.*, was not at the date of the garnishee order in April, 1883, an attachable debt. It was not a debt either present or accruing. It was a mere claim for unliquidated damages and was not the subject of attachment in the hands of the insurance company.

Secondly, it is clear that the plaintiff Randall obtained on the 7th of April, 1883, a regular, and, until reversed, a valid order attaching in the hands of the insurance company a debt to the amount of 127*l.* 5*s.* 6*d.*, admitted, or at least not disputed, to have been then due from them to the judgment debtor. This order remains valid and undisturbed to this day; there is nothing on the face of this order to earmark the debt due to Lithgow out of which the 127*l.* 5*s.* 6*d.*, is to be paid, still less to identify it with Lithgow's claim for damages against the insurance company.

There is no reason to doubt that both the plaintiff and the insurance company had this claim in contemplation when the plaintiff applied for and the insurance company submitted to the garnishee order of the 7th of April, but that is immaterial. The order was made upon the tacit admission by the insurance company that they were indebted to Lithgow on the 7th of April, 1883, in an amount equal to the judgment debt due from Lithgow to the plaintiff for 127*l.* 5*s.* 6*d.*

Then the question arises whether the insurance company being pressed with these rival claims are entitled to be relieved from their difficulty by the process of interpleader.

We think that they are not. The plaintiff is in the position of a judgment creditor of the insurance company for 127*l.* 5*s.* 6*d.*, upon his order of the 7th of April, and unless that judgment or order has been satisfied in whole or in part he is entitled to issue execution against the insurance company for that amount.

It is a fallacy to suppose that the claimants Green and Jebbutt can have any claim whatever to 127*l.* 5*s.* 6*d.*, or that the plaintiff has any claim to any part of the 248*l.* 2*s.* 11*d.* specifically. The

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insurance company have placed themselves in their present difficulty by allowing the order of the 7th of April, 1883, to be made against them by default instead of appearing and shewing cause against it, and stating, as the fact was, that there was no debt due or accruing due from them to the judgment debtor, Lithgow.

The order appealed against must therefore be reversed and the order of the Master dismissing the summons must be restored and the insurance company must pay to the plaintiff the costs of the appeal to the judge and of this appeal.

Appeal allowed with costs.

Solicitor for plaintiff: *Ralph Raphael.*
Solicitors for garnishees: *Linklater & Co.*
Solicitors for claimants: *Price & Sons.*

J. R.

March 8.

TODD *v.* ROBINSON.

*Penalty—Remission—*22 *Vict. c.* 32*—Local Government Acts—Officer interested in Contract with Local Authority—Local Government Act,* 1875 (38 *&* 39 *Vict. c.* 55), *s.* 193.

Under 22 Vict. c. 32—which enables the Crown to remit penalties imposed by statute on convicted offenders—there is no power to remit the penalty to which the officers of local authorities are liable under s. 193 of the Local Government Act, 1875, for being interested in any contract made with such local authorities.

ACTION against the defendant, as officer of a local authority, under the Public Health Act, 1875, s. 193 (1), to recover a penalty of 50*l.* to which the defendant was liable for having been interested in a contract with the local authority. Judgment

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 193: "Officers or servants appointed or employed under this Act by the local authority shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act.

"If any such officer or servant is so concerned or interested, &c., he shall forfeit and pay the sum of fifty pounds, which may be recovered by any person with full costs of suit by action of debt."

having been obtained for the amount claimed with costs, upon application by the defendant the Treasury, purporting to act under 22 Vict. c. 32, s. 1 (1), made an order for a remission of the penalty. A summons was then taken out in chambers to stay proceedings upon the judgment, and upon the hearing Field, J., made an order in the terms of the summons.

The plaintiff appealed.

J. L. Walton, for the plaintiff. There was no power under 22 Vict. c. 32, to remit the penalty, for it is not a penalty imposed upon a "convicted offender" within the Act. These words must be taken to refer to a penalty imposed by a conviction; and to constitute a conviction it is essential that the defendant should be charged with and found guilty of an offence according to the ordinary forms of criminal procedure. And it has always been necessary, both before and after 11 & 12 Vict. c. 43, that a conviction should contain an express adjudication of a penalty: Paley on Summary Convictions, 5th ed., p. 252. Looking at the other words of s. 1 of 22 Vict. c. 32, it is clear that they are inapplicable to money recovered in an action of debt. The word "imposed" implies that the penalty is imposed by some judicial authority upon the offender. Here the money is made payable by the statute, and the judgment in the action of debt is to recover what is forfeited already.

T. W. Chitty, for the defendant. There is nothing in 22 Vict. c. 32, s. 1, to limit the word "penalty" to a penalty imposed for a criminal offence, and the word "convicted" does not necessarily imply a proceeding in a Court of summary jurisdiction. The power to remit the penalty is general in its terms, and is not affected by the proceeding prescribed for its recovery.

DAY, J. I am of opinion that this appeal must be allowed, on the ground that the penalty sued for is not one which can be remitted under 22 Vict. c. 32. The penalty is imposed by the

(1) 22 Vict. c. 32, s. 1: "It shall be lawful for Her Majesty to remit in whole or in part any sum of money which under any Act now in force or hereafter to be passed may be imposed as a penalty or forfeiture on a convicted offender, although such money may be in whole or in part payable to some party other than the Crown."

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Public Health Act, 1875, s. 193, and may be recovered under this section by action of debt. But the penalties referred to in 22 Vict. c. 32, are penalties to be imposed on convicted offenders in proceedings of a criminal nature taken with a view to the punishment of the parties offending. The object of the present action is simply to recover money, and it is not within either the words or the spirit of the Act.

SMITH, J. I am of the same opinion. The penalty of 50*l.* is imposed by s. 193 of the Public Health Act, 1875, on officers of local authorities who may be interested in contracts made with any such authority and it is to be recovered by action of debt. The present action was brought under this section, and judgment recovered, and it is argued that under 22 Vict. c. 32, the Treasury has power to remit the penalty. The question for our determination is whether the defendant is a convicted offender to whom the royal clemency may be extended within this Act. I think that it cannot. After judgment had been recovered for the penalty a ca. sa. might have been issued against the defendant in respect of it, but the judgment is not a conviction within 22 Vict. c. 32. This Act is, I think, limited to persons who are summarily convicted and fined for some breach of the law. I will add that after judgment had been recovered against the Brighton Aquarium Company for penalties under the Lord's Day Act, it was thought necessary to pass the Act 38 & 39 Vict. c. 80, to enable the Crown to remit the penalty, which would have been wholly unnecessary if the defendant's construction of 22 Vict. c. 32, were the correct one.

Appeal allowed.

Solicitors for plaintiff: *Brownlow & Howe.*
Solicitors for defendant: *J. E. & H. Scott.*

A. P. S.

THE GLOUCESTERSHIRE BANKING CO., LIMITED *v.* PHILLIPPS. CREAGH, THIRD PARTY.

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Practice—Third Party—Appearance — Summons for Directions — Judgment on—Judicature Act, 1873, *s.* 24, *sub-s.* 3—*Judicature Act*, 1875, *s.* 24—*Order XVI., r.* 52—*Married Women's Property Act*, 1882, 45 *&* 46 *Vict. c.* 75, *s.* 1.

Under Order XVI., rule 52, judgment against a third party who has appeared pursuant to a third party notice, but, at the hearing of an application by the defendant for directions, declines to state any defence, may be ordered, if the judge is not satisfied that there is any question proper to be tried as to the liability of the third party.

The rule is consistent with the Judicature Act, 1873, s. 24, sub-s. 3, and the Judicature Act, 1875, s. 24, and is not ultrà vires.

Such judgment under the rule may, since the Married Women's Property Act, 1882, be ordered against a married woman, third party, as a feme sole, declaring her separate estate chargeable even in respect of a liability created before that Act.

APPEAL from Chambers.

An action having been brought by the plaintiff company against the defendants as executors for a sum due on a guarantee dated the 5th of July, 1882, for £300, given by their testator in respect of the banking account of Mrs. Creagh a married woman, the defendants entered an appearance and obtained leave to serve and served a third party notice under Order XVI., rule 48, on her. She appeared. The defendants paid £291 10*s.* into Court. The plaintiffs accepted the money, and gave notice to the defendants of the acceptance in full satisfaction of the claim. The defendants then took out a summons for directions, or for judgment against the third party, under Order XVI., rule 52, and on the 8th of February last the third party appeared before a Master, who made no order. On the 12th of February an order was obtained to stay the action on the ground of the plaintiffs' acceptance of the sum paid into Court. On the 5th of March, the defendants appealed to Field, J., at chambers, against the refusal of the Order under Order XVI., rule 52, and the third party was asked to state what question of liability there was to be tried, and to make an affidavit of merits, but declined, and

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insisted that she had a right to proceed to trial, and that the judge had no power to order summary judgment.

The learned judge upon hearing the parties and reading an affidavit filed on behalf of the defendants, ordered that a judgment be entered in favour of the defendants against the third party, declaring that any separate estate of the third party, not subject to any restraint against anticipation to which she at the date of the guarantee was and to which she still was entitled, was chargeable with the payment to the defendants of the sum of 291*l.* 10*s.* and interest at 4 per cent. from the date of the order until payment; and further ordered in the usual terms that an inquiry be had before one of the Masters as to her separate estate, and that execution be limited to the same.

Bray, for the third party, moved to rescind the order.

The defendants having settled the action with the plaintiffs, cannot, without giving the third party an opportunity of intervening, get judgment against her. She desired to dispute the plaintiffs' claim, and entered an appearance under Order XVI., rule 49, and has a right to defend herself.

[LORD COLERIDGE, C.J. Has she any defence?]

That does not appear. She is entitled to contest the matter. Except under Order XIV, judgment cannot be obtained against a party who appears and desires to defend, and that Order does not apply to a third party. Under the Judicature Act, 1873, s. 24, sub-s. 3, the Courts are empowered to grant to a defendant as against a third party, only such relief relating to or connected with the original subject of the cause or matter "as might properly have been granted against such person if he had been made a defendant .... and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant."

If Order XVI., rule 52, enables a judge to order summary judgment against a third party who has appeared without having an opportunity of defending the action, the rule overrides the Act, and is ultrà vires. But if the rules are read together they shew that their object was to give to the third party all her

rights of defence. The "question of liability" referred to in rule 52, merely means a question whether there was or was not a contract of indemnity. The judge cannot call on the third party for an affidavit; the rule gives no such power, and Order XIV. does not apply.

Judgment cannot be given against a married woman. At least, not in respect of a liability created before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, s. 1), which came into force on the 18th of August, 1882. Sect. 1 is not retrospective.

Finlay, Q.C., and *T. W. Chitty*, for the defendants. By Order XVI., rule 52, the Court or a judge if "not satisfied" that there is a question as to the liability of the third party, may order such judgment as the nature of the case may require to be entered in favour of the defendant. The words are clear and conclusive. If there is no question, an issue cannot be directed. By rule 51, when a third party makes default in entering an appearance judgment may be given against him. Surely the third party who appears without being able to suggest a defence cannot be in a better position than one who makes default in appearance. Rule 53 provides amply for giving the third party liberty to defend "if it shall appear desirable" upon hearing the application under rule 52 for directions. Rule 52 is not ultrà vires. The Judicature Act, 1873, s. 24, sub-s. (7), empowers the High Court to grant all remedies that the parties may appear to be entitled to, "so that as far as possible all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." Rule 52 is for that object, and does not contradict sub-s. 3 of s. 24, and, being procedure, is within the powers given by the Judicature Act, 1875, s. 24.

Secondly, the Married Women's Property Act applies to all procedure thereafter: *James* v. *Barraud*. (1)

Bray, replied. Sect. 24 of the Act of 1875 only applies where on account of the transfer of jurisdiction from one tribunal to another it might be necessary to alter or modify the rules. The third party has not admitted liability, and denies that her separate estate is bound. A defendant cannot, except under

(1) 31 W. R. 786.

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Order XIV., be called before a judge in chambers to swear to his defence; nor can a third party. The time has not yet come for putting in her defence. She has a right to deliver a pleading.

LORD COLERIDGE, C.J. (after stating the facts). The question is whether a third party who has appeared pursuant to a third party notice and is brought before a judge on an application for directions, but will take no proceeding at all, comes within Order XVI., rule 52? May the judge under that rule, if he is satisfied that there is no question proper to be tried, "order such judgment as the nature of the case may require" against the third party? In this case the learned judge had the parties before him; he asked what question there was to be tried. The third party would not say. Instead of saying that she had a defence either technical, substantial, or moral, she stood on her supposed rights, and contended that the learned judge could not proceed under rule 52 at all. We asked her learned counsel if she had a defence. He says he has no instructions. Will she make an affidavit? She will not. I think that my Brother Field could do nothing else than say, as he did, that he was not satisfied there was anything to be tried, and therefore order such judgment as the justice of the case required, viz., judgment against the third party. This case seems to be exactly within the terms of rule 52. We cannot hold that the learned judge had no power to make this order, unless we hold that rule 52, the very terms of which have been complied with, did not give him power.

Two objections have been raised. It is said that the third party is a married woman, and that judgment could not be ordered against a married woman. The answer is the case which has been cited, and the principle on which it was decided, viz., that the Married Women's Property Act is retrospective with respect to procedure. On and after the passing of the Act "a married woman shall be capable . . . of suing and being sued . . . in all respects as if she were a feme sole"; s. 1, sub-s. 2. The Act means what it says, and assuming there is separate estate—and the order is carefully framed to apply against her separate estate only—the case comes directly within the terms of the Married Women's Property Act, 1882. Both on *James* v.

Barraud (1) and general principles I think that the first point fails, and the third party is wrong. But it is said, secondly, that inasmuch as under the Judicature Act, 1873, the third party is to be entitled to the same rights as a defendant, and the rule takes away such rights as she would have as if she were defendant, the rule is ultrà vires. I think that there are two answers to that: first, that no right is taken away which is conferred by the Judicature Act. The third party is in the position of any other defendant, and if any other defendant appears and will make no defence, when properly called upon to make it, according to the Judicature Acts and Rules, judgment may be signed against him. Here the third party being called before the learned judge at chambers was asked to state what defence she had, and if she had a defence she would be put to try it. So first I say that she is not deprived of any right, in the true and reasonable sense of the word, given by the Judicature Act, 1873. But secondly, I think that the Judicature Act, 1875, has—if it were necessary, which I do not think it is—enlarged the power of those making the rules very much by s. 24, which enacts that "where any provisions in respect of the practice or procedure of any courts the jurisdiction of which is transferred by the principal Act or this Act to the High Court of Justice or the Court of Appeal, are contained in any Act of Parliament, Rules of Court may be made for modifying such provisions to any extent that may be deemed necessary for adapting the same to the High Court of Justice and the Court of Appeal." There is, therefore, no ground for suggesting that rule 52 is beyond the powers of those who made it. No substantial right is touched, the whole matter is a matter of procedure, matters of procedure are clearly within the jurisdiction of those who made the rule, and, as is well known to all, these rules had to lie on the table of both Houses of Parliament for the full period of forty days during the session of Parliament, and if either House was dissatisfied with anything in the rules it had only to address the Crown to disallow it, and it would probably have been disallowed. So it is clear that even without the latter Act there was power to make this rule, and with the latter Act it is very clear that there

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was power to make it. The rule is accurately followed in the order of the learned judge, and accordingly I am of opinion that the appeal must be dismissed with costs.

WILLIAMS, J. With some hesitation, or rather doubts, I have come to the same conclusion, but, I regret to say, not on the same grounds. If it appeared to me clear, as I thought it was at one time, that the effect of Order XVI., rule 52, was really to deprive a third party of such rights and opportunities of defence against the claim as she would have had if duly sued in the ordinary way, I should, as at present advised, come to the conclusion that the rule was ultrà vires, for it seems to me that the Act authorizing the making of rules did no more than authorize the making of rules to regulate practice and procedure, and if the rule went further than that, I should have thought it had gone too far, and had taken away actual rights: but I think that is not the true view. I think the third party procedure rules have substituted a different machinery to that which would be used in an action brought against a defendant, but without altering the right. A defendant is authorized to serve a notice on the third party, and the form is given in App. B., No. 1. According to the whole structure of this machinery, that notice to the third party practically fills the place of a statement of claim. It warns the third party that an action has been brought against the defendant, and that the defendant will claim against the third party on the grounds therein specified. A notice having been given, if the third party desires to dispute either the claim against the defendant, or the defendant's claim against him, he must appear.

So far the proceeding is like the ordinary proceeding against a defendant. The next proceeding is this: If the third party does not dispute the plaintiff's claim, but does dispute the defendant's claim against him, what follows? This is not like the case of an action against a defendant where a time is limited to put in a statement of defence. The provision for that is inapplicable and unsuited to this case. The machinery applicable is provided in Order XVI., rule 52. It gives the defendant an opportunity of bringing the third party before the judge to satisfy the judge that there is something to be tried. I think that does reserve

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to the third party all rights with respect to her defence that she would have had if she had been a defendant sued in the ordinary way. There is no limit as to time during which the third party might stand out, and it seems to me that if the third party coming before the judge declines to bring forward any defence she places herself in the position of letting judgment go by default, and is in precisely the same position as if a regular action had been brought against her, a statement of claim delivered, and she had let the time for a statement of defence go by without delivering it.

Appeal dismissed.

Solicitor for defendants: *E. Bromley.*

Solicitors for third party: *Field, Roscoe, & Co.*

J. R.

FEARON *v.* THE EARL OF AYLESFORD.

March 29.

Separation Deed — Husband and Wife — Contract — Condition Precedent — Independent Covenants — Covenant to pay Annuity — Covenant against Molestation — Molestation, what amounts to.

Held, that covenants in a separation deed, by which respectively the husband covenanted to pay an annuity to a trustee for the wife, and the trustee covenanted that the wife should not molest the husband, must be construed as independent covenants in the absence of any express terms making them dependent, and therefore that a breach of the covenant that the wife should not molest the husband was not an answer to an action for the annuity.

Adultery on the part of the wife, resulting in the birth of a child, is not "molestation" within such a covenant against molestation by the wife.

By DENMAN, J. It might be molestation within the meaning of the covenant to put forward a child so born in adultery as being the child of the husband.

ACTION by the plaintiff, as trustee for the defendant's wife under a separation deed made between the defendant, his wife, and a trustee for such wife, for 475*l.*, arrears of an annuity which the defendant had covenanted by the deed to pay to the trustee in trust for the wife.

The statement of defence and counter-claim (inter alia) stated by way of defence that the separation deed contained a covenant by the wife's trustee that the wife should not molest the defendant at any time after the making of the deed, and that after the making of the said deed and before the breaches of covenant

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sued for, the wife did molest the defendant; and also counter-claimed damages in respect of such molestation.

At the trial before Day, J., during the Hilary Sittings, 1884, the facts appeared to be as follows, so far as material to the points reported.

The separation deed, which was made between the defendant of the first part, his wife, the Countess of Aylesford, of the second part, and the trustee of the third part, recited that unhappy differences had arisen between the defendant and his wife, that they had in consequence for some time past lived separate from each other, and that they had agreed to continue so to do, and that such arrangements should be entered into as were hereinafter contained. It was then witnessed that in pursuance of the said agreement, and for effectuating the said arrangements, and in consideration of the covenants on the part of the trustee thereinafter contained, the defendant did thereby covenant with the trustee that, notwithstanding her coverture, his wife might at all times during the defendant's life live separate from him and free from his control and authority, as if she were unmarried, and that he would not in any manner compel or endeavour to compel her to cohabit with him, or in any manner molest or interfere with her in her way of living, or otherwise, and would not sue or prosecute any person for receiving or assisting her; and it was further witnessed that in further pursuance of the said agreement, and for further effectuating the said arrangements, and in consideration of the premises, the defendant did covenant with the trustee that he would during the joint lives of himself and his wife pay, or cause to be paid, to the trustee in trust for the wife an annuity of 500*l.*, by equal half-yearly payments, on the 22nd day of February and 22nd day of August in each year. There then followed a covenant by the defendant making various provisions for the enjoyment by the wife for her separate use of all real estate of which she or the defendant through her might thereafter be seised, and of her jewels, dress, and other personal property; and it was then further witnessed that in further pursuance of the said agreement, and for further effectuating the said arrangements, and in consideration of the provisions thereinbefore contained, the trustee did thereby covenant that the defendant's wife should not at any time thereafter molest the

defendant, and should not in any manner compel or endeavour to compel him to cohabit with her, and further that the trustee would at all times thereafter keep indemnified the defendant against all the debts and liabilities which the defendant's wife had already contracted, or should thereafter contract, and against all actions, &c., in respect of such debts and liabilities.

The non-payment of the annuity by the defendant was not denied, but it was alleged for the defendant that there had been a breach of the covenant against molestation on the part of the wife. It was proved that after the execution of the deed the defendant's wife had been living in adultery, and had given birth to a male child, of whom the defendant was not the father. The defendant had no male issue at the time of the separation. Evidence was also given, the effect of which was alleged on behalf of the defendant to be to shew that the defendant's wife had caused this child to be called by the title of Lord Guernsey, which would be the title by courtesy of the son and heir of the Earl of Aylesford, and had held him out as being such son and heir.

The learned judge left it to the jury to say whether there had been a breach of the covenant against molestation, and the jury found in the affirmative, and assessed the damages on the counter-claim at 100*l*. The learned judge reserved his judgment, and subsequently, on further consideration, held that the molestation was an answer to the plaintiff's claim, the covenants to pay the annuity and against molestation being dependent covenants. He therefore gave judgment for the defendant on the claim and also on the counter-claim, but without damages. (1)

March 19. The plaintiff moved for a new trial on the ground, in substance, that there was no evidence of molestation within the meaning of the deed to go to the jury, and also under Order XL. rule 5, to set aside the judgment of Day, J., and enter judgment for the plaintiff on the claim and counter-claim.

(1) The judgment of the learned judge upon further consideration was as follows:—

DAY, J. In this case, the jury having found that Lady Aylesford has molested the defendant, the only matters which now remain to be determined by me are whether such molestation is a defence to the action, or is available only upon the counter-claim and by way of damages: or again, as

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Finlay, Q.C., and *R. O. B. Lane*, for the plaintiff. There was no evidence of molestation by the wife to go to the jury.

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strenuously insisted upon on behalf of the plaintiff, whether, if it be available at all, it can be made available in any way in any action brought to recover the annuity. It seems to me, after careful consideration of the very able arguments addressed to me by counsel on both sides, and of the authorities cited by them, that the question whether a breach of a covenant not to molest in a separation deed may or may not be—is or is not—an answer to a covenant to pay the annuity is not substantially affected by any judicial decision. In no one of the cases cited does it appear that the effect of molestation generally, quâ breach of covenant not to molest, has ever been raised by a plea or its effect judicially determined, and therefore I am left to ascertain by recourse to general principles whether the covenant to pay the annuity contained in this deed is to be considered as independent of the covenant not to molest, which is also contained in the deed. If it is to be considered as independent, then a breach of the covenant not to molest would not be a defence to an action upon the covenant to pay the annuity. The covenant to pay the annuity in the case before me is in form absolute, but that is not by any means conclusive, and one must get if possible beneath the form to the very substance. One must therefore, in order to ascertain the independence or the dependence of a covenant, look also, and carefully, to the circumstances and objects of the deed and to the nature of the several covenants contained in it. Now here we know that the defendant made this settlement upon his wife at a time when, after certain misconduct, she was living apart from him, but not as I understand with any known adulterer, and when she was, as may be presumed, in need of some provision for her maintenance. The defendant made that provision for her at a time when he could not be expected to live with her, and when it was known that their marriage could never be dissolved and that any children she might bear would primâ facie be entitled to rank as his children. The deed contemplated their living apart, reasonable provision for the wife's maintenance, security to the husband against molestation, and, as a matter of form, security also against liability for debts which might be incurred by the wife. I say, as a matter of form, because a husband under the circumstances existing in this case could not well have been made responsible for any such debts of his wife. The covenant not to seek to enforce restitution of conjugal rights need not be considered, for it also under the circumstances was the merest form and could entail no serious consequences. I may then summarise the deed as having for its basis or object, common to both parties, the living apart, and with this common object the husband agrees to pay the wife an annuity and she agrees not to molest him. I say "she agrees" because the intervention of a trustee does not affect the substance of the transaction. It thus seems to me that the covenant not to molest is really the whole consideration for the covenant to pay the annuity. Now can this covenant not to molest be apportioned? Can breaches of it be appreciated in damages? Can it be deemed to have been the intention of

Adultery cannot be molestation within the meaning of the deed and affords no defence: *Baynon* v. *Batley* (1); *Gandy* v. *Gandy*. (2)

the parties that it should be apportioned or that breaches of it should be appreciated in damages? I think that all these questions must be answered in the negative, and therefore I cannot treat the covenant to pay the annuity as otherwise than dependent upon that freedom from molestation which was the one consideration benefiting the husband and for the sake of which he undertook the burthen of the covenant; and I am further of opinion, having regard to the relation of the parties and to the nature of the covenants, that any molestation, meaning thereby substantial injury, knowingly and without lawful excuse inflicted, would amount to an abandonment and loss of all right to further benefit under the deed; just as I should consider the trustee relieved of liability under his covenant by substantial default of the husband in payment of the annuity. I come therefore to the conclusion that, the jury having found that Lady Aylesford did molest the defendant, he has succeeded in establishing his defence to the claim and is entitled to judgment thereon. I am further of opinion that, having similarly succeeded upon the issue joined on the counter-claim, he is also entitled to judgment thereon, but, for the reasons above given, without damages. Although these are the only matters to be determined by me, some argument has been urged upon me on behalf of the plaintiff to the effect that I was wrong in holding, as I certainly did, that there was evidence of molestation fit to be submitted to the consideration of the jury. I decline to reconsider my ruling in the course of the trial. I decline to reconsider it because as to it I am now functus officio. I have directed the jury, they have acted thereon, and, if I have erred, my error can only be corrected by some other Court. However, as the occasion is thus thrust upon me, I repeat that in my judgment the conduct charged against Lady Aylesford of relapsing into adulterous intercourse with the Duke of Marlborough, accepting an annuity from him, giving birth to a bastard child begotten by him, and putting that child forward as the child of her husband, as Lord Guernsey, and therefore entitled to suceed to the estates and title of the defendant, was consistent with molestation and might be found by the jury to be molestation within the meaning of the covenant, if they considered it proved, and that it amounted to substantial molestation, using the word "molestation" in the sense of injury knowingly and without lawful excuse inflicted upon another in his person, character, social position, or property. I also repeat that there was evidence fit to be submitted to the jury, even as against Lady Aylesford, had she been the person suing upon the covenant, and that there was other and additional evidence as against the plaintiff Fearon of molestation by reason of his own admissions as to Lady Aylesford's conduct. It is useless for me to say more about the point raised as to damages not being recoverable at all against the plaintiff unless in an independent action, than that I consider this argument utterly untenable.

(1) 8 Bing. 256.

(2) 7 P. D. 77, 168.

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It is submitted that, having regard to the scope of the deed, the molestation intended is conduct which would nullify the object of the deed. The object of the deed is that the parties may live separate without any interference with one another and as far as possible as if the relationship of husband and wife did not exist. The molestation aimed at is personal molestation by such acts as seeking for a renewal of cohabitation, applying to the husband for money, or going to his house and making a disturbance or other similar acts of personal molestation. The word "molest" certainly does not in the ordinary acceptation of the term cover everything done by the wife that may trouble or annoy the husband.

There was no evidence (1) that the defendant's wife had called or caused the child to be called Lord Guernsey or held him out as the lawful heir of the defendant, and if there was, that, again, is not the sort of molestation contemplated by the deed.

The covenant to pay the annuity and the covenant that the wife shall not molest are independent covenants, and the breach of the latter covenant is no defence to an action on the former. It surely cannot be contended that a single act of molestation would avoid the deed; and yet the defendant's contention must go this length. If the parties had intended the covenants to be dependent they would have expressly so provided. [They cited *Jee* v. *Thurlow* (2); *Charlesworth* v. *Holt* (3); *Goslin* v. *Clark* (4); *Stavers* v. *Curling* (5); *Thomas* v. *Everard.* (6)]

Waddy, Q.C., and *F. Turner*, for the defendant. There was evidence for the jury of molestation of the defendant by his wife within the meaning of the deed. It must be admitted that mere adultery on the part of the wife would not be molestation; but it is contended that adultery with circumstances of scandal, adultery followed by the birth of a child, may under the circumstances amount to molestation. Molestation means any act which per-

(1) The details of the evidence and the arguments and observations of the judges with regard to the effect of it are omitted as not being material to the points here reported.

(2) 2 B. & C. 547.

(3) Law Rep. 9 Ex. 38.

(4) 12 C. B. (N.S.) 681; 31 L. J. (C.P.) 330.

(5) 3 Bing. N. C. 355.

(6) 6 H. & N. 448.

sonally annoys or prejudices the husband. The presumption of law is that a child born during coverture is the child of the husband. Therefore the husband is prejudiced and subjected to annoyance by the existence of the child, especially where, as in this case, landed estates are in question, and the child if legitimate would be his heir. Molestation must no doubt be by an act. The adultery is an act, and, the result being annoyance, is an act of molestation. There was evidence that the defendant's wife caused and allowed the child to be called Lord Guernsey in her household, and put him forward as being the lawful heir of the defendant, and if so this would be molestation in any acceptation of the term. It would be a personal annoyance of the husband and intended to be such. There is no reason why the word "molestation" should receive such a narrow construction as is contended for on behalf of the plaintiff.

The covenants against molestation and to pay the annuity are dependent covenants, and a breach of the former is an answer to the action. Molestation goes to the root of the separation deed. The absence of molestation is the consideration for the payment of the annuity. The covenant not to molest cannot be apportioned. The molestation cannot be compensated by damages. It would be impossible to estimate the damages. There could be no action against the wife personally on the separation deed, and she might repeatedly molest the husband, while he would be compelled to pay the annuity all the time, having only his right of action against the trustee. [They cited *Gandy* v. *Gandy* (1); *Crouch* v. *Waller* (2); *Hunt* v. *Hunt* (3); *Roberts* v. *Brett* (4); *Seagrave* v. *Seagrave* (5); *Besant* v. *Wood.* (6)]

Finlay, Q.C., in reply.

DENMAN, J. This is a case of some novelty and difficulty. The action is brought by the trustee of a separation deed to recover arrears of an annuity covenanted to be paid, and it is not disputed that these arrears are due, subject to the question whether there is a good defence to the claim on the grounds

(1) 7 P. D. 77, 168.
(2) 4 De G. & J. 302.
(3) 4 D. F. & J. 221; 31 L. J. (Ch.) 101.
(4) 34 L. J. (C.P.) 241.
(5) 13 Ves. 439.
(6) 12 Ch. D. 605.

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relied upon by the defendant. That question mainly turns upon the construction which we ought to put upon the separation deed. Briefly stated, the point argued on the construction of the deed is this: are the covenants in this deed so absolutely dependent on one another that, on any default made by one of the parties in the performance of a covenant to be performed by him, he is thenceforth incapable of suing upon the deed or taking any advantage under it; or are they independent covenants, the consideration for the covenants by one party being the entering into the covenants by the other? The recitals of the deed do not help us in arriving at the true construction. The witnessing part of the deed states that it is "in pursuance of the recited agreement and in consideration of the covenants thereinafter contained" that the parties respectively covenant. In the absence of any words in the covenants themselves, making them dependent covenants, primâ facie these words would not import that they were so, but rather the contrary. Then when we come to look at the covenants themselves, there is nothing in the words used to make the covenants dependent. The covenant on the part of the Earl of Aylesford is, as it appears to me, so far as the language goes, an absolute covenant to pay or cause to be paid the annuity or yearly sum therein specified. There is nothing in the language used to qualify or restrict that undertaking or to make it dependent on any circumstances or contingencies. So again the covenant relied on for the defendant, the covenant against molestation, and to indemnify the husband against the wife's debts, is equally in terms an absolute covenant, and contains no words qualifying or restricting the undertaking therein contained. The deed itself, therefore, does not help us by anything upon the face of it towards any other construction than that which the words of the covenants primâ facie import, viz., that they are independent covenants.

Such being the language of the deed, what are the facts which give rise to the question with regard to its construction? It appears that after the deed was executed, whilst the parties were living separate, and had been so living for such a period that the defendant could not be the father of any child born of his wife, the Countess was delivered of a child which it was not

disputed was the issue of her adultery with some other person. The defendant's counsel admit that the decisions so clearly shew that the mere fact of adultery committed would not constitute molestation, or be any defence under a deed such as this, that they cannot contest that point. It is, therefore, enough to say that in my opinion after the decisions cited it would be impossible to contend that mere adultery was within the meaning of the covenant against molestation. But it is argued that adultery followed by the birth of a child is molestation. I endeavoured to follow and appreciate the argument as to that, but it seems to me absolutely impossible so to hold. Adultery admittedly not of itself amounting to molestation, how can it be said that, if the subsequent result of the adultery is the birth of a child, then the act that was originally not molestation becomes molestation? Molestation must be, as it seems to me, by some act. The fact of having a child is not an act done by the woman herself in the sense of being a voluntary act. If the act of adultery is not per se an act of molestation, how can it become an act of molestation because it is followed by the birth of a child?

Then it is said that there was another sort of molestation, that Lady Aylesford did that which was likely to annoy her husband by calling the child or causing him to be called by the second title of the earldom, viz., by the title of Lord Guernsey, and holding him out as the son and heir of the defendant. The judge left it to the jury to say whether such conduct amounted to molestation. I am not prepared to say that, assuming it to be proved that the Countess had done what was alleged, it might not be molestation. I think it might be molestation within the meaning of the deed to hold out this child as the child of the defendant. I do not see why the word "molest" should receive so narrow a construction as to exclude conduct so likely to cause personal annoyance to the husband. It was, however, strenuously argued that there was no sufficient evidence for the jury that Lady Aylesford had pursued the course of conduct alleged. I cannot say my mind is altogether without doubt on this subject. [His Lordship then proceeded to discuss the evidence on the subject.] On the whole I think there was evidence on which the jury might find that Lady Aylesford did what was alleged

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against her in this respect, and that it was molestation, and therefore I am not prepared to set aside the verdict of the jury on these points.

Thus we arrive at the main question in the case, viz., whether there being molestation it is a defence to the claim for the arrears of the annuity. On this point I think we are in effect bound by authority, though the exact point has never been decided. The decisions in the cases of *Charlesworth* v. *Holt* (1) and *Grant* v. *Budd* (2) seem to me to point distinctly to the conclusion that, where there is a covenant such as this in a separation deed, for payment of an annuity during the life of the wife, it is an independent covenant unless made dependent by express words. There may be cases of acts absolutely inconsistent with, and amounting to an entire frustration of, the main object of the deed, viz., separation, which may perhaps admit of different considerations from those applicable to the present case, but so far as the question as to the construction of these covenants is concerned, I am of opinion that they are independent covenants, and that the plaintiff is entitled to recover upon the defendant's covenant to pay the annuity, notwithstanding that there may have been a breach of his own covenant against molestation as alleged by the defendant. It is argued that there can be no pecuniary measure of damage for breach of a covenant not to molest, but I do not see any insurmountable difficulty on that score. A jury would have no greater difficulty in assessing the damages for breach of such a covenant than in an action for breach of promise of marriage, or any other action involving annoyance to the feelings. The jury have here assessed the damages for the molestation at £100, having regard to all the circumstances of the case. The learned judge who tried the case, holding that the covenants were dependent, has declined to give effect to that finding, and has given judgment for the defendant on the claim and on the counterclaim for nominal damages only. Being of opinion, as we are, that the covenants are independent, we think that that is not the correct result of the findings. We do not on the whole think it the proper course to send the case for a new trial, but having all the facts before us, we think the

(1) Law Rep. 9 Ex. 38. (2) 30 L. T. (N.S.) 319.

proper course will be to enter verdict and judgment for the plaintiff for the amount of the arrears claimed, and for the defendant for the £100 awarded by the jury as damages for the molestation.

MANISTY, J. This is a somewhat peculiar case, and I am sorry to say I do not in all respects agree with either of my learned Brothers (Day and Denman, JJ.) The first question that arises is whether, upon the true construction of this deed of separation, the covenants by the husband and the trustee for the wife respectively are dependent or independent covenants. So far as its terms are concerned, the covenant sued upon by the plaintiff is an absolute independent covenant. If it had been the intention of the parties that the covenant should be subject to the condition that the husband should only be liable to pay the annuity so long as the wife did not molest him, it would have been easy to say so. Similar provisions are familiar to us. It is a common limitation that the liability to pay shall only continue while the wife continues to lead a chaste life.

So here it would have been easy to provide that the annuity should only continue payable so long as there was no molestation by the wife. Such a provision might be made either by way of limitation or by way of proviso to the covenant. The contention must be that we ought to read such a limitation or proviso into the covenant. But one great principle or canon of construction is that words which are not in an instrument ought not to be imported into it unless the implication is a necessary one. On what principle are we to imply such a limitation or proviso in the present case?

In the case of *Grant* v. *Budd* (1), to which my Brother Denman has referred, Lord, then Mr. Justice, Blackburn, said: "There is on the face of the deed an express covenant to pay the sum of 1*l.* a week during the life of the wife. If it was intended that the payment of this sum should cease upon the determination of the relationship of husband and wife, it would have been easy to insert this condition in the deed; but by the decision of the Court of Exchequer" (of which his Lordship approved) "this

(1) 30 L. T. (N.S.) 319.

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condition must not be implied, but put in express words." It seems to me that the same reasoning is applicable to the present case.

It was argued that non-molestation of any kind was a condition precedent on the ground that molestation went to the whole consideration for the husband's covenant, but clearly that is not so. The covenant of the wife's trustee to indemnify the husband against debts contracted by the wife is a material part of the consideration (see the authorities collected in Lush's Law of Husband and Wife, tit. Deeds of Separation). The primary object of the parties was that they should live separate. "Molestation" is a very wide and general term, and is not confined to such molestation, if any, as might go to the root of the contract. It appears to me that the words of the deed express very clearly what was the real intention of the parties, namely, that the husband and wife should live separate and apart from each other, that the wife should go and live where and how she pleased so long as she did not live, or seek to live, with her husband, and that the husband should make her an annual allowance of 500*l.* for her support, he having the covenant of some responsible person as a security against any molestation by her and an indemnity against any liability for her debts. It was urged that the wife might again and again molest the husband. It is not necessary to decide the point, but I am very much inclined to think that, giving effect to what is really the substance of the covenant, namely, that the wife, through the medium of her trustee, covenants not to molest her husband, an injunction might be obtained against her if she was guilty of continuing molestation within the meaning of the deed. However this may be, I am clearly of opinion that the mere breach of the covenant not to molest does not avoid the deed. That being so, I cannot agree with the judgment of my Brother Day, and though I feel the highest respect for his opinion, I must act upon my own view of the case. I think that judgment must be entered for the plaintiff on the claim for the amount of the arrears of the annuity.

I now come to that part of the case as to which I cannot altogether agree with my Brother Denman, viz., the counter-claim.

It is admitted that adultery by itself would not be molestation within the meaning of the deed, but it is said that adultery followed by the birth of a child is such molestation. My Brother Denman has sufficiently answered this argument. The birth of the child is involved in the act of adultery, and is a mere consequence of it. It seems to me a most extraordinary and untenable proposition that the ultimate result of the act, according as a child may be born or not, should determine whether it is an act of molestation or not. Upon this part of the case I agree with my Brother Denman. But then it is said that there was molestation in that the wife held out the child born in adultery as the child of her husband born in lawful wedlock. I doubt whether that, if proved, would constitute molestation within the meaning of the deed, but it is unnecessary to decide the point, because I am of opinion that having regard to the only evidence *which was admissible against the wife* (this the learned judge discussed) there was no evidence on which the jury could reasonably find that the wife did hold out the child to be the child of her husband. Unfortunately there is a difference of opinion between my Brother Denman and myself on this point, consequently my judgment upon that part of the case will be withdrawn, and the result is that judgment will be entered for the plaintiff on the claim for the arrears of the annuity, and for the defendant for 100*l.* on the counter-claim.

Judgment accordingly.

Solicitor for plaintiff: *J. H. Lee.*
Solicitors for defendant: *G. E. Kaye & Co.*

E. L.

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March 8.

CIE FRANÇAISE DU TÉLÉGRAPHIE DE PARIS À NEW YORK *v.* THE PENZANCE UNION.

Poor-rate—Rateable Subject under 43 *Eliz. c.* 2*—Telegraph Wires—Exclusive Occupation—License of exclusive Use.*

By agreement between a telegraph company and the Postmaster-General, the latter covenanted with the company that he would provide, and thenceforth during the continuance of the agreement keep appropriated and maintain for the exclusive use of the company certain telegraph wires, called in the agreement "special wires," between the landing-place of a foreign telegraphic cable near the Land's End and an office of the company at Penzance, and thence to their office in London, with the necessary translators for working them, and a pneumatic tube; such wires, &c., to remain the property of the Postmaster-General,—the Postmaster-General to repair all accidental defects or interruptions to the working of the wires, &c., but to be paid for making good any damage to the wires occasioned by the neglect or default of the company or their servants; the company not to use the wires for the transmission of any except certain specified messages. And, in consideration of the appropriation and maintenance by the Postmaster-General of the wires, translators, batteries, and pneumatic tube, the company covenanted to pay him certain rents; and they also covenanted not to part with the possession of the special wires or any of them, or underlet or assign the benefit of the agreement, without the consent of the Postmaster-General; and that, in the event of their doing so, the Postmaster-General was to be at liberty to determine the contract by notice: and it was further provided that, upon the expiration or determination of the agreement, it should be lawful for the Postmaster-General to resume the possession of the special wires, &c. The telegraph posts remained the property of the Postmaster-General, and carried between Penzance and London several wires beyond those appropriated to the use of the company:—

Held,—Lord Coleridge, C.J., doubting,—that this agreement did not give the company such an exclusive occupation of the special wires as to make them rateable to the relief of the poor in respect thereof, even in the parish where the special wires were the only wires affixed to the posts.

Special case under 12 & 13 Vict. c. 45, s. 11.

2. The appellants are a telegraph company owning certain submarine cables between France and America, and also working submarine cables between France and a point on the Cornish coast near the Land's End, and carrying on the business of a telegraph company in connection therewith.

3. In order to enable them to carry on their business as aforesaid, the appellants on the 14th of April, 1880, entered into an agreement with certain telegraph companies who were possessed

of concessions for the laying of submarine telegraphic cables between England and France, for the construction of a telegraphic cable between the aforesaid point near the Land's End and a part of the French coast; and also with Her Majesty's Postmaster-General. [A copy of the agreement was appended to the case.] (1)

(1) The material covenants in this agreement, as between the appellant company and the Postmaster-General, are the following:—

10. The Postmaster-General shall with all convenient speed provide and shall thenceforth during the continuance of this agreement keep appropriated and maintained for the exclusive use of the Paris and New York Company the following telegraph wires (hereinafter called special wires), that is to say,—

(1.) A telegraph wire between the landing-place of the Déolin cable near the Land's End, in the county of Cornwall, and an office to be established by the company at Penzance.

(2.) A telegraph wire between the office to be established by the company at Penzance and an office to be established by the company in London.

(3.) A telegraph wire between the office to be established by the company at Penzance and an office to be established by the company at Liverpool.

(4.) A telegraph wire between the office to be established by the company in London and the office to be established by the company at Liverpool.

11. The Postmaster-General shall also with all convenient speed provide, and shall thenceforth during the continuance of this agreement keep appropriated and maintain and work for the exclusive use of the company a pneumatic tube connecting the central telegraph office of the Postmaster-General in London with the offices of the company at No. 24, Royal Exchange, London.

12. The Postmaster-General shall also with all convenient speed provide, and shall thenceforth during the continuance of this agreement keep appropriated, maintain, and work for the exclusive use of the company in connection with the said two special wires, two instruments called translators, and the necessary batteries in connection therewith, at the head post-office at Bristol or at such other postal telegraph office as may be selected by the Postmaster-General; and the said translators shall be such as can conveniently be worked in connection with the instrument known as the "Morse apparatus," with polarized relay and a single or double current key.

13. The special wires, pneumatic tube, and translators and batteries for the time being appropriated to the use of the company as aforesaid shall remain and be the property of the Postmaster-General.

14. Except as aforesaid, the company shall provide and maintain their own instruments and batteries, and shall work the special wires for the time being at their own cost.

15. The company shall not in working either of the special wires passing through Bristol use any instrument which, in the opinion of the Postmaster-General or any of his officers, cannot conveniently be used in connection with the said translators; and the company shall not in working the

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4. On or about the 25th of January, 1881, the appellants entered into a supplemental agreement with the Postmaster-

special wires to be provided and appropriated as aforesaid, or any of them, use any instrument, battery, or materials which, in the opinion of the Postmaster-General or any of his officers, shall or may injure or be likely to injure any part of the said wires; and the company shall within twenty-four hours after notice in writing shall have been sent to their principal office for the time being in London by or on behalf of the Postmaster-General, or any of his officers, that any instruments used by the company cannot be conveniently used in connection with the said translators, or that any instrument, battery, or materials used by the company is or are injurious or likely to be injurious to any of the special wires, discontinue the use of the instruments, batteries, and materials specified in such notice; and the company shall permit the Postmaster-General, by his engineers, electricians, or any other officer or officers who may be appointed by him for that purpose, to inspect from time to time, with or without notice, the instruments, batteries, and materials used or intended to be used by the company in the working of the special wires or any of them.

16. The Postmaster-General shall incur no liability to the company by reason of any accidental defects or interruptions to the working of any of the special wires or of the translators or batteries for the time being appropriated to the use of the company, but will repair with all convenient speed any such accidental defects or interruptions.

17. Notwithstanding the stipulations hereinbefore contained, the Postmaster-General shall not be liable to make good any damage to any of the said special wires which any of the officers of the Postmaster-General for the time being in charge of their maintenance respectively shall certify to have been occasioned by the act, neglect, or default of the company or their servants or agents: and, if the Postmaster-General shall make good any such damage, as aforesaid, the company shall on demand pay to him the costs of so doing; aad the certificate of any such officer as aforesaid shall be conclusive as to the amount of such costs.

18. The company shall not use any of the said special wires for the transmission of any messages except American messages and service messages of the company.

19. In consideration of the appropriation and maintenance by the Postmaster-General for the use of the company of the special wires, the company shall during the continuance of this agreement pay to the Postmaster-General in respect of each special wire a yearly rent or sum calculated at the rate of 5*l.* for every mile of the length of such special wire, and at the like rate for any fraction of a mile of such length.

20. In consideration of the appropriation and maintenance by the Postmaster-General for the use of the company of the said pneumatic tube, the company shall during the continuance of this agreement pay to the Postmaster-General in respect thereof the yearly rent or sum of 350*l.*

21. In consideration of the appro-

General relative to the above matters. [A copy of this agreement accompanied and was to form part of the case.]

5. Under and in pursuance of such agreements the appellants

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priation, maintenance, and working by the Postmaster-General to the use and on behalf of the company of the said translators and batteries, the company shall during the continuance of this agreement pay to the Postmaster-General the yearly rent or sum of 350*l.*

24. The special wires, the Déolin cable, and the American cable, shall, whilst worked by the Paris and New York Company, be open for the messages of all persons alike without favour or preference.

34. The company shall not part with the possession of the special wires or any of them without the consent of the Postmaster-General under his seal; and the company shall not without the like consent assign, dispose of, or underlet the benefit of the agreements and stipulations between the Postmaster-General and the company contained in these presents or any of them, or any part thereof.

41. Provided that, in case the company shall, without the consent of the Postmaster-General and the submarine companies under their respective seals, part with the possession of the Déolin cable, or of the special wires, or any of them, or shall without such consent as aforesaid assign, dispose of, or underlet the benefit of the agreements and stipulations herein contained, or any of them, or any part thereof, or in case any sum of money which shall be payable by the company to the Postmaster-General or to the submarine companies under or by virtue of these presents, shall be in arrear and unpaid for two calendar months after the same ought to have been paid, or in case the company shall use the Déolin cable or the special wires, or any of them, for the transmission of any message not being a service message or a message which has been or is intended to be transmitted from or to America by means of the American cable, or in case the company shall not commence the business of transmitting messages between France and America within six calendar months after the date of these presents, or, having commenced such business, shall afterwards cease for a period of twelve calendar months to carry on the same, then and in any such case it shall be lawful for the Postmaster-General and the submarine companies at any time thereafter, by notice in writing under their respective seals, to determine these presents, and the rights and obligations hereby created, as from the date of the service of such notice at the office or last-known office of the company in London.

43. Upon the expiration or determination by any means of these presents and the rights and obligations hereby created, it shall be lawful for the Postmaster-General to resume the possession of the said special wires and each of them, and for the submarine companies to take possession of the Déolin cable, free from any right or interest of the Paris and New York Company therein respectively; but subject, as to the said cable, to the provisions of any agreement or agreements that may be then subsisting between the Postmaster-General and the submarine companies in relation thereto.

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have the use, as therein provided, of two telegraphic wires, which are the property of the Postmaster-General. These wires are supported upon poles in the ordinary way, and extend from Penzance, in Cornwall, to the landing place of the aforesaid telegraphic cable near the Land's End.

6. During a portion of their course, the said wires pass through the parish of St. Buryan in the Penzance Union in the county of Cornwall; and the respondents, the assessment committee having jurisdiction over such parish, in drawing up their supplemental valuation list, included the appellants as persons liable to be rated to the relief of the poor of such parish in respect of an alleged occupation by them of the said telegraphic wires and poles situated in such parish; and, in accordance with such valuation list, the appellants were on the 5th of October, 1881, rated to the relief of the poor in the said parish in the sum of 16*s*. The following is a copy of such rate:—

No.	Name of Occupier.	Name of Owner.	Description of Property rated.	Name or situation of Property.	Gross estimated Rental.	Probable Value.	Rate at 1*s*. in the Pound.
					£ *s*. *d*.	£ *s*. *d*.	£ *s*. *d*.
12 13	French Telegraphic Company.	..	Telegraph poles and wires.	Parish throughout.	20 0 0	16 0 0	0 16 0

10. The appellants have no further or other interest in the said telegraphic wires and poles than such as is given to them by the provisions of the agreements above referred to.

The question for the opinion of the Court was, whether the appellants are liable to be rated in respect of the said telegraphic poles and wires, or either of them.

Addenda, by consent, to the special case:—

The special wires kept appropriated and maintained for the exclusive use of the appellants under the said agreements are supported on poles or otherwise fixed in precisely the same manner as other telegraphic wires. During the whole of their course between Penzance and London, the special wires above referred to are supported on the same poles as other wires belonging

to the Postmaster-General, and used by him for general telegraphic purposes. The Postmaster-General has not up to the present time established any telegraphic station at the landing-place of the Déolin cable (a distance of nine miles from Penzance) nor at any such station along this route of the separate wires between those two places.

All the wires of the Postmaster-General from Penzance which go in the same direction as the special wires to Déolin are supported on the same poles as such special wires for about a quarter of a mile. They then (with the exception of two which go to Newlyn) branch off in directions differing from that of the special wires. The two wires to Newlyn continue to be supported upon the same posts as the said special wires for a further distance of a mile and a quarter, and then branch off.

1884. Feb. 22. *F. M. White, Q.C.* (*Moulton* with him), for the appellants. In the case of *Electric Telegraph Co.* v. *Overseers of Salford* (1), the company were held to be rateable to the relief of the poor in every parish through which they passed, because they occupied land by means of their posts and wires. Here, however, there is no occupation by the appellants of any land within the statute 43 Eliz. c. 2. The posts and wires are the property of the Postmaster-General, as also are the translators and batteries and the pneumatic tube; and these are all to be kept in working order and repair by him. There is no demise to or exclusive occupation by the company of anything which can be the subject of rating. That which is conveyed to the company by the agreement of the 14th of April, 1880, is merely the exclusive use or enjoyment of two special (not specific) wires, and of the necessary instruments and apparatus for conveying their messages,—a mere licence to use any two wires which the Postmaster-General may choose to appropriate to them. Notwithstanding some equivocal expressions in articles 34, 41, and 43, by the whole scope of the agreement the wires remain the property and in the actual possession of the Postmaster-General. "In order to ascertain the true meaning, the whole instrument must be looked

(1) 11 Ex. 181; 24 L. J. (M.C.) 146.

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at: parts of it must not be taken separately; the question arises upon the whole." (1)

[The following cases were also referred to: *Allen* v. *Overseers of Liverpool* (2); *Reg.* v. *Smith* (3); *Reg.* v. *St. Pancras Assessment Committee* (4); *Midland Ry. Co.* v. *Badgworth* (5); *Smith* v. *Lambeth Assessment Committee* (6); *London and North Western Ry. Co.* v. *Buckmaster*. (7)]

Charles, Q.C. (*E. Bullen* with him), for the respondents. The wires in question are clearly rateable to the relief of the poor of St. Buryan, and the appellants have such an exclusive occupation as to be rateable in respect of them. The whole scope of the agreement of August, 1880, and especially articles 34, 41, and 43, shew that the Postmaster-General parted with the possession of the two special wires to the company.

[CAVE, J. Not two specific wires. Suppose a wire cut or otherwise damaged by a trespasser, by whom could an action be maintained?]

By the appellants. They have the sole and exclusive use and possession of them. The special wires appropriated to them cannot be used by the Postmaster-General for Post Office purposes. The company are to repay to the Postmaster-General the cost of repairs rendered necessary by the neglect or default of the company or their servants: art. 17.

[CAVE, J. A lodger breaks a window; he must repair it. Could the company maintain an action against the Postmaster-General if he used the wires specially assigned to the company's use for the transmission of postal messages?]

No doubt they could, if *their* messages were delayed thereby. By art. 34 the company are precluded from parting with the possession of the wires allotted to them. That clearly is inconsistent, as also is the language of articles 41 and 43, with the contention of the company. Nor does it follow from the right of the Postmaster-General to substitute other wires in lieu of those

(1) Per Brett, L.J., in *Smith* v. *Lambeth Assessment Committee*, 10 Q. B. D. 330.
(2) Law Rep. 9 Q. B. 180.
(3) 3 E. & E. 383.
(4) 2 Q. B. D. 581.
(5) 34 L. J. (M.C.) 25.
(6) 9 Q. B. D. 585; affirmed, 10 Q. B. D. 327.
(7) Law Rep. 10 Q. B. 70.

originally appropriated to the company, that the company are not to have the exclusive occupation until that substitution takes place. It is the wire, not the post, that is the subject of beneficial occupation. In *Smith* v. *Lambeth Assessment Committee* (1) there was no real demise, or any complete exclusive possession by the appellants of the book-stalls; the tenant (as he was called) could not have unobstructed access to them at all times.

F. M. White, Q.C., in reply.

Cur. adv. vult.

March 8. CAVE, J. The question in this case is, whether the appellants by the terms of an indenture of the 14th of April, 1880, are in the exclusive occupation of certain telegraph wires, so as to be rateable to the poor-rate of the parish of St. Buryan in respect of them, or whether they have only the enjoyment of the wires, without any rateable occupation thereof.

It does not appear distinctly from the case or the addenda whether the Postmaster-General has any wires in the parish of St. Buryan except the special wires; but it is stated that, during the whole of their course between Penzance and London, the special wires are supported on the same poles as other wires belonging to the Postmaster-General. There is nothing in the agreement to prevent the Postmaster-General from attaching other wires to the telegraph posts throughout the parish of St. Buryan; and our judgment cannot turn upon the fact, if it be so, that none other but the special wires are supported by the telegraph posts in the parish in question.

Telegraph posts and wires have been held to be rateable: *Electric Telegraph Co.* v. *Salford* (2); and, from the report of that case, it appears to have been the unanimous conclusion of the judges of the Exchequer that the wires as well as the posts are rateable. By that judgment we are bound: and the only remaining question is, whether the appellants have an exclusive occupation of these wires.

The indenture recites that it has been agreed that the Postmaster-General shall appropriate for the use of the appellant company certain special wires. In the operative part there is no demise in terms: but the Postmaster-General covenants that

(1) 9 Q. B. D. 585; 10 Q. B. D. 327. (2) 11 Ex. 181; 24 L. J. (M.C.) 146.

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he will with all convenient speed provide and thenceforth during the continuance of the agreement keep appropriated and maintain for the exclusive use of the company a telegraph wire between the landing-place of the Déolin cable near the Land's End and an office to be established by the company at Penzance, and also a telegraph wire between the office at Penzance and an office to be established by the company in London. The Postmaster-General also covenants that he will with all convenient speed provide and thenceforth during the continuance of the agreement keep appropriated and maintain for the exclusive use of the company a pneumatic tube connecting the central telegraph office of the Postmaster-General in London with the offices of the company in that city; and, further, that he will with all convenient speed provide, and thenceforth during the continuance of the agreement, keep appropriated, maintain, and work for the exclusive use of the company, in connection with the special wires, two translators and the necessary batteries in connection therewith at the head post office at Bristol. By the 13th clause of the agreement the special wires, pneumatic tube, translators, and batteries for the time being appropriated to the use of the company are to remain and be the property of the Postmaster-General.

Pausing here for a moment, I would remark, first, that the Postmaster-General does not covenant to appropriate any definite wire to the use of the company, and that, if there were a dozen wires suspended from the telegraph posts, it is left entirely to the Postmaster-General to decide which he would appropriate to the use of the company, and that he may change the wire as he thinks fit,—secondly, that there are no words used in this part of the agreement which import that the company is to have possession of the wire,—thirdly, that the words "shall keep appropriated and maintain" rather point to a retention of possession by the Postmaster-General,—and, fourthly, that the same words, with the addition of the words "and work," are used with reference to the translators, of which the Postmaster-General is obviously to retain possession, as are used with reference to the wires and the pneumatic tube.

By clause 14 the company are to provide and maintain their own instruments and batteries, and to work the special wires for

the time being at their own cost. By clause 15, the company are not, in working the special wires, to use any instrument, &c., which shall or may injure or be likely to injure the wires; and they are to permit the Postmaster-General to inspect from time to time the instruments, &c., used or intended to be used in the working of the special wires. By clause 16, the Postmaster-General is to incur no liability to the company by reason of any accidental defects or interruptions to the working of any of the special wires *or of the translators or batteries* for the time being appropriated to the use of the company; but is to repair with all convenient speed any such accidental defects or interruptions. By clause 17, the Postmaster-General is not to be liable to make good any damage to the special wires which any of the officers of the Postmaster-General for the time being in charge of their maintenance respectively shall certify to have been occasioned by the act, neglect, or default of the company or their servants; and, if the Postmaster-General shall make good any such damage, the company shall on demand pay to him the costs of so doing. By clause 18, the company are not to use any of the wires for the transmission of any messages except American messages and service messages of the company.

Pausing here again, I fail to see in any of these stipulations anything to lead me to conclude that the company are to be the exclusive occupiers of the wires. The clause impowering the Postmaster-General to inspect the company's instruments, but not to inspect the wires, rather points to the conclusion that the wires are regarded as being still in the possession of the Postmaster-General: and so does clause 17, which does not give the Postmaster-General power to enter and make good damage done by the company, but simply provides that, if he makes good any such damage (assuming apparently that he has a right to do it), the company will pay the cost of so doing.

Clause 19, which provides for a rent to be paid by the company in respect of each special wire, in consideration of the appropriation and maintenance of the wires for the use of the company, would favour the contention of the respondents, were it not that precisely similar language is used in clause 20 in respect of the pneumatic tube, and in clause 21 in respect of the translators and batteries.

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There are, however, two clauses,—the 34th and the 43rd,—which to my mind create some difficulty; and I am not sure that I understand them. Clause 34 provides that the company shall not part with the possession of the special wires without the consent of the Postmaster-General. Clause 41 provides that, if they do so, the Postmaster-General may determine the agreement. And clause 43 provides that, on the expiration or determination of the agreement, the Postmaster-General may resume the possession of the wires. I find no similar provisions with respect to the pneumatic tube; and I have come to the conclusion that these words refer, not to the wires as the subject of physical occupation, but to the control over the use of the wires which the company obtain by reason of the wires being in communication with the instruments in their offices at Penzance, London, and Liverpool.

The Postmaster-General is the owner of the posts and of all the wires. He is admittedly to retain possession of all the posts. He is to provide special wires (not definite wires, but any wires he may from time to time deem suitable,) for the use of the company; and he is to keep these wires appropriated to such use, and maintain them during the continuance of the agreement, by his officers, who are to be in charge of their maintenance. The company, on the other hand, are to have the exclusive use of the wires; but they are not to work them with any instruments, &c., they please, but only with such as in the opinion of the Postmaster-General will not injure the wires; nor are they to use the wires except for the transmission of American messages and service messages; and they are to keep them open for the messages of all persons alike, without favour or preference.

Suppose a stranger injured the wires in some way that did not interfere with their power of transmitting messages, as, for instance, by painting them or affixing advertisements to them; could the company bring an action? I think not. Suppose some way of utilizing the wires were discovered which would produce a profit also without interfering with their power of transmitting messages, to whom would the right of so using the wires belong? Surely, to the Postmaster-General, and not to the company. But, if these things are so, the Postmaster-General is the occupier, and not the company.

On the whole, I have come to the conclusion that the Postmaster-General, and not the company, occupies the rateable subject, and that the company have only an exclusive enjoyment, without exclusive occupation. The case seems to me to resemble most the case of a lodging-house keeper who agrees that a particular lodger shall have the exclusive use of a bed-room, and stipulates that, if the rent is not duly paid, the lodger shall give up and the lodging-house keeper may resume possession of the bed-room. I apprehend that in that case no one could suggest that the lodger was rateable; more especially if, as is the case here, the selection of the particular bed-room were to be left to the keeper of the lodging-house. I therefore think our judgment should be for the appellants.

LORD COLERIDGE, C.J. It has often been said, and upon very high authority, that questions of construction are amongst the most difficult, and those upon which there is most difference of opinion. I must confess that, if I had written the judgment in this case, I should have begun at the opposite end of the agreement, and, relying upon the 41st and 43rd clauses, would have endeavoured from the language of those clauses to explain the more difficult provisions of the instrument. I fail to see how the Postmaster-General can *resume* possession of the special wires free from any right or interest of the Paris and New York Company therein, unless he had once conveyed to that company the exclusive possession of those wires. I cannot, however, deny the great force and reasoning of my Brother Cave's very learned judgment, and the arguments and considerations he has put forward in support of the result which he has arrived at: and I do not feel sufficient confidence in my own opinion to justify me in differing from it, though I rather incline to the opposite conclusion.

I think, however, it is a proper case for an appeal.

Judgment for the appellants.

Solicitor for appellants: *John Mackrell.*

Solicitors for respondents: *Dangerfield & Blythe, for J. Crosby, Penzance.*

J. S.

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March 25.

[IN THE COURT OF APPEAL.]

STOCK *v.* INGLIS.

Insurance (Marine)—Insurable Interest—Goods in which property had not passed to the Assured.

By a contract in writing D. & Co., sugar merchants in London, agreed to sell to the plaintiff, a Bristol merchant, 200 tons of sugar of a certain description, to be shipped from Hamburg to Bristol at the price of 21*s.* 9*d.* per cwt. net f. o. b. Hamburg; payment by cash in London in exchange for bill of lading. In order to satisfy such contract and also a similar contract for the sale of sugar to another Bristol merchant, D. & Co.'s forwarding agents at Hamburg shipped there about 400 tons in 3900 bags of sugar of the description contracted for, and consigned the same to "order Bristol." It was the usual course of business of D. & Co., as the plaintiff knew, not to appropriate specific bags of sugar to any particular contract at the time of shipment, but to apportion the bags and the bills of lading representing them between their different buyers at the port to which they were shipped after they had been shipped, and after D. & Co. had received the bills of lading.

The *City of Dublin*, on which such shipment was made, was lost with her cargo on the voyage before any appropriation had been so made by D. & Co., but 2000 bags representing 200 tons were subsequently appropriated by D. & Co. to the plaintiff's contract and an invoice of the same sent to the plaintiff, who thereupon paid the contract price, and obtained the bill of lading.

The plaintiff, who had a "floating" policy of insurance on "goods" declared thereunder on the *City of Dublin* in respect of these 200 tons of sugar:—

Held, in an action on such policy against the defendant who had underwritten it, that the plaintiff had an insurable interest in such sugar notwithstanding no property in it had passed to him before the loss, inasmuch as, according to the term f. o. b. in a contract of sale made under the above circumstances, the sugar was shipped at the risk of the plaintiff, who was liable to pay against bill of lading whether the sugar arrived or not.

Appeal by the plaintiff from a judgment of Field, J., on further consideration. (1)

The plaintiff, a Bristol merchant, sought to recover from the defendant, an underwriter at Lloyd's, under a "floating" marine policy on "goods" in respect of a loss of 3900 bags of sugar shipped on board the *City of Dublin* from Hamburg to Bristol. The sugar had been so shipped at Hamburg for Messrs. Drake & Co., London merchants, by their forwarding agents there,

(1) 9 Q. B. D. 708.

in intended performance of two written contracts for sale entered into by Drake & Co., with two Bristol buyers in January, 1881. By the earliest of these two contracts (the 7th of January) Drake & Co. agreed to sell to a Bristol firm, W. Beloe & Co., 200 tons of sugar price 21*s.* 9*d.* per cwt. net f. o. b. Hamburg for 88 degrees net saccharine contents. Sugar to analyse between 85 and 92 net, 6*d.* per cwt. to be paid or allowed for each degree above or below 88, but anything above 92 not to be paid for, and should the average analysis of the whole contract exceed 90, such excess not to be paid for. For January delivery at Hamburg. Payment by cash in London in exchange for bill of lading.

By the second contract of the 12th of January, Drake & Co. agreed to sell to the plaintiff a similar quantity at a like price upon identical terms. After the loss it became for the first time known to Drake & Co. and to the plaintiff that Beloe & Co. had entered into the contract of the 7th of January with Drake & Co. for the purpose of enabling them to execute a contract previously made by them on the same day with the plaintiff for 200 tons at an advanced price and with the additional term that the price f. o. b. was on "a steamship to Bristol."

The ultimate destination of the whole 400 tons was thus Bristol, deliverable by Drake & Co. f. o. b. at Hamburg during the month of January. The ordinary course of business, and which course was known to the plaintiff, was for Drake & Co.'s forwarding agents at Hamburg, to ship by that boat of the Hamburg and Bristol line of steamers next due to sail after the time fixed for delivery, and the *City of Dublin* was the one in turn for the departure at the end of the last half of January.

The plaintiff on the 31st of January, in writing to Drakes, expressed his hope that the 200 tons of the 12th were on the steamer then due to leave Hamburg, and in reply he received a letter from Drake & Co. that the sugar was not only at Hamburg but that there would probably be extra expense chargeable to him owing to delay in steamer's arrival out and consequent delay in departure. About the same time Drake & Co. advised Harrman & Theilnehmer, their Hamburg forwarding agents, that they had sold 400 tons for Bristol and gave them the necessary orders as to which bags were to be shipped for that port,

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begging them to engage room by the *City of Dublin* and send the bills of lading to London as soon as possible.

The whole of the sugar which Drake & Co. had appropriated to satisfy the two contracts together had not arrived however at Hamburg at the time of the departure of the steamer, and in consequence Herman & Theilnehmer were not able to ship by the *City of Dublin* more than 3900 bags, and they advised Drake & Co. of this short shipment, proposing to send the 100 short shipped by the next steamer due to sail on the 15th of February. They did, however, ship 3900 bags, and took several bills of lading by which they were made deliverable to "order Bristol," but no appropriation was made by them of any specific bags, that is to say, as to which of the bags were to be Beloe's, and which of them the plaintiff's, but the whole 3900 were shipped in one undistinguishable mass, and all were consigned simply "order Bristol." This was in accordance with the usual course of business of Drake & Co., which was not to fulfil contracts of this kind by appropriating the sugar to each buyer at the time of shipment, but to ship enough to satisfy all the contracts they might have for sugar, which were deliverable at any particular port, and after the shipment to apportion the sugar shipped between the buyers at that port according to each contract. The apportionment was made so that no part of the sugar to be supplied under any contract should exceed 92 degrees net saccharine matter, and that the average should not be more than 90, for all net above, although paid for by Drake & Co. in Germany, would under the terms of the contract go for nothing in England, and so be a loss to them. It was therefore the usual course of business for Drake & Co. not to make the apportionment until they had got the bills of lading, when by comparing them with the certificates of the analysis made of the sugar in Germany, and which were duly forwarded to them in London, and had references to the marks and number of the bags in which the sugar was packed, they could ascertain the net saccharine contents of each lot of bags, and could allot the bags to their different buyers at the port for which they were shipped so as to correspond in respect of the specific quantity of net sugar with the degree contracted for.

Messrs. Drake & Co's. transactions of this character were very

extensive as well with the plaintiff as others, and the general course of business between them and their buyers had been for the buyer to bear the cost of the insurance against sea risks from the time of delivery, and the Court of Appeal drew the inference that as a matter of fact both the plaintiff and Beloe & Co. knew that it was the course of business of Drake & Co. to apportion and appropriate the sugar to the contracts with their different buyers in the way above described after and not at the time of the shipment.

The *City of Dublin* with the 3900 bags of sugar on board left Hamburg on the 3rd of February, 1881, and was lost with her cargo on the morning of the 4th. On the 4th of February, Drake & Co., who had then got the bills of lading, apportioned the 3900 bags between Beloe and the plaintiff, and in doing so appropriated 2000 bags out of the mass to Beloe and 1900 to the plaintiff, and they made out invoices to each accordingly, that to Beloe & Co. shewing an average percentage on the whole of 89·5875, and that to the plaintiff of 89·35, both averages therefore being kept under 90.

News of the loss arrived before these invoices were posted, and the plaintiff, anticipating that he might have the 200 tons on board coming to him under his contract, although without any specific advice of the shipment, declared on the *City of Dublin* under the policy sued on for any loss in respect of those 200 tons. In the letter to the plaintiff of the 4th of February, in which Drake & Co. inclosed the invoice to the plaintiff for the 1900 bags, they proposed that the contract should be cancelled as to the 100 short shipment, and to this the plaintiff assented, but this was done after both parties knew of the loss.

The plaintiff and Beloe & Co. subsequently respectively paid the contract price, and obtained the bills of lading for the sugars specified in their respective invoices, and Beloe & Co. afterwards sent an invoice of the 200 tons of sugar sold by him to the plaintiff, who thereupon paid the price of these and received the bills of lading in respect thereof. The plaintiff then declared under the floating policy in respect of this last mentioned sugar. In consequence of the loss of the ship and cargo, the plaintiff, who had made two sub-contracts with the Bristol Sugar Refining

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Company for the sale to them of the sugar he had contracted to buy of Drake & Co. and Beloe & Co. at an advanced price, failed to realise the profit he had contracted for.

Upon these facts the plaintiff's right to recover was denied by the defendant on the ground that no property in the sugar had passed to him before the loss; and, secondly, that at the time of the loss he had no insurable interest in the sugar itself, and that even if he had an insurable interest in "profits" he was not entitled to declare the loss in respect of that interest upon a policy on "goods." Field, J., before whom the action was tried, was of opinion on further consideration that the plaintiff had neither property nor insurable interest in the sugar, and that as he was not entitled to recover for a loss of profit under a policy like this on goods, the defendant was entitled to judgment, and he gave judgment for the defendant accordingly. The plaintiff appealed.

Charles Russell, Q.C., and *R. Reid, Q.C.* (*Danckwerts* with them), for the plaintiff. The real question in this case is not whether any property in the sugar had passed to the plaintiff before the loss, but whether he had an insurable interest therein. As soon as the sellers had put sugar on board the vessel at Hamburg in performance of their contract, and which answered the description of such sugar in the contract, the sellers had discharged their part of the contract and the sugar was at the buyer's risk, although it had not been appropriated so as to pass the property in it to the buyer. The plaintiff, therefore, had an insurable interest in the sugar before the property in it had passed to him. To have an insurable interest it is sufficient that a person should have, as Lord Eldon said in *Lucena* v. *Craufurd* (1), "a right in the property or a right derivable out of some contract about the property." If a person has agreed that certain property shall be at his risk he has an insurable interest therein, though the property is not his. In *Joyce* v. *Swann* (2) Willes, J., considered that "even if by reason of some special circumstances the property did not pass on shipment, yet by reason of the risk the buyer might insure the cargo in respect of the interest he had in it,"

(1) 2 B. & P. (N.R.) 321. (2) 17 C. B. (N.S.) 84, at p. 104.

and Lord Blackburn said in *Wilson* v. *Jones* (1): "I know no better definition of an interest in an event than that indicated by Lawrence, J., in *Barclay* v. *Cousins* (2), and more fully stated by him in *Lucena* v. *Craufurd* (3), that if the event happens the party will gain an advantage, if it is frustrated he will suffer a loss." In *Anderson* v. *Morice* (4) the rice which the plaintiff contracted to buy was not at his risk under the contract until the loading of it on board the ship was completed, and the Exchequer Chamber therefore held the plaintiff had no insurable interest in the rice. On appeal to the House of Lords, the Lords were equally divided and so the judgment of the Exchequer Chamber was affirmed, but Lord Chelmsford, one of the affirming Lords, said: "If the intention of the parties is to be collected from the written contract alone, according to the case of *Appleby* v. *Myers* (5), until the cargo was completely made up no interest in it passed to the purchaser. But although the purchaser of a cargo may have no interest in it until a certain event, as for instance until delivery, he may, if he pleases, expressly take upon himself all risks and dangers of the voyage, as in *Castle* v. *Playford* (6), although without a stipulation to this effect he would not be affected by anything which might happen to the cargo in its transit to him." In that case all the Lords agreed to the principle of law that if from the facts it could be inferred that the goods were at the buyer's risk, the buyer had an insurable interest. Here the plaintiff was to pay for the sugar whether it arrived at Bristol or not. Both parties to the contract knew that the allocation of the sugar to each particular purchaser was in practice never made at the time of shipment but long afterwards and when the ship was in the ocean, and yet it was agreed that the sugar, though at that time an unascertained part of the bulk shipped, should be at buyer's risk. [They also cited *Jackson* v. *Anderson* (7) and *Hill* v. *Secretan* (8).]

(1) Law Rep. 2 Ex. at p. 150.
(2) 2 East, 544.
(3) 2 B. & P. (N.R.) at p. 301.
(4) Law Rep. 10 C. P. 609; 1 App. Cas. 713.
(5) Law Rep. 2 C. P. 651.
(6) Law Rep. 7 Ex. 98.
(7) 4 Taunt. 24.
(8) 1 B. & P. 315.

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Cohen, Q.C., and *J. Gorell Barnes*, for the defendant. At the time of the loss the plaintiff had no property in the sugar, nor was it at his risk. He had, therefore, no insurable interest in the sugar. Messrs. Drake might have appropriated at the time of shipment the sugar required to meet their contract with the plaintiff, and to which, therefore, the terms f. o. b. could have applied, but they did not do so. The sugar at the time of the shipment was not, therefore, at the risk of the plaintiff. To be at his risk it must be at the risk that he would have to pay the price, but what price? The price of the sugar could not be ascertained until appropriation, and the percentage of saccharine matter had been made out. It never was the intention of the parties that the sugar should have been at the plaintiff's risk before there had been an appropriation of it by the seller, and there is nothing in the facts as proved at the trial to shew that the plaintiff knew that it was the practice of Drake & Co. not to make the appropriation until after they had received the bills of lading. To enable the plaintiff to have had an insurable interest he ought at the time of the loss to have had a property in the goods, or to have had such an interest in them that he was damaged by their loss. "The general rule is clear," said Willes, J., in delivering the judgment of the Court in *Seagrave* v. *Union Marine Insurance Co.* (1), "that to constitute interest insurable against a peril it must be an interest such that the peril would by its proximate effect cause damage to the assured." The authorities on the subject were all reviewed by the Court of Common Pleas in *Ebsworth* v. *Alliance Marine Insurance Co.* (2) At the time of the loss, which is the time to be considered, the plaintiff had no insurable interest in the sugar, he had merely an expectation that he would have it, but no right which he could enforce to have any particular sugar on board the *City of Dublin*: *Stockdale* v. *Dunlop.* (3) There was no liability on the part of the plaintiff at the time of the loss to pay for the sugar, and, therefore, as he would not then suffer any pecuniary loss, the case of *Anderson* v. *Morice* (4) is an authority for the defendant.

(1) Law Rep. 1 C. P. at p. 320.
(2) Law Rep. 8 C. P. 596.
(3) 6 M. & W. 224.
(4) Law Rep. 10 C. P. 609; 1 App. Cas. 713.

[BRETT, M.R. I cannot believe that the plaintiff was unacquainted with the practice of Drake & Co. not to appropriate sugar to their particular contracts until after they had received the bills of lading. Then, under these circumstances was it not the meaning of the term "free on board" in this contract that the sugar when shipped was to be at the purchaser's risk, so that he was bound to pay for it whether it arrived or not?]

Where there has been a sale of specific goods, or such an appropriation with the assent of both parties, so that the property in them was passed to the purchaser when they were shipped free on board, then and then only are the goods at the risk of the purchaser: *Brown* v. *Hare* (1); Blackburn on Contract of Sale, pp. 126, 127; Benjamin on Sale, 2nd ed. p. 276.

R. Reid, Q.C., in reply, cited *Cowasjee* v. *Thompson* (2), where Lord Brougham said: "It is proved beyond all doubt, indeed it is not denied, that when goods are sold in London free on board, the cost of shipping them falls on the seller, but the buyer is considered as the shipper."

BRETT, M.R. Nobody can deny that this is a case of extreme difficulty and of great nicety.

In my opinion it is the duty of a Court always to lean in favour of an insurable interest, if possible, for it seems to me that after underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, and one which has no real merit, certainly not as between the assured and the insurer. Of course we must not assume facts which do not exist, nor stretch the law beyond its proper limits, but we ought, I think, to consider the question with a mind, if the facts and the law will allow it, to find in favour of an insurable interest.

In this case it seems to me to have been proved that there was in Bristol—I will not say a custom of trade, because I do not think that this was proved—but a course of business in this sugar trade, and that that course of business consisted in this:—Where sugar was shipped, at all events from Hamburg for Bristol by a particular shipper, sufficient to fulfil the orders

(1) 4 H. & N. 822; 29 L. J. (Ex.) 6.

(2) 5 Moo. P. C. 173.

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which he had for Bristol, and the price of the sugar depended upon the quantity of saccharine matter in the sugar, it was impossible to be very precise as to shipping the exact amount of saccharine matter to which any particular contract was entitled. In consequence of the difficulty of shipping the exact amount of saccharine matter with regard to each contract at the time of shipment, the course of business was for the shipper to take bills of lading of small quantities of the sugar, so that when he saw the analyses of the sugar, he might, by distributing the bills of lading according to those analyses, allocate to each contract out of the sugar shipped the amount of saccharine matter which was due to each contract, and it seems to me that whether that allocation or distribution could or not have been done before the shipment, it never was done before the shipment, but it was done after shipment, and it was done in England. That is the inference that I draw from the evidence.

Then it is proved that the plaintiff was a person who had dealt in that business at Bristol, and had made many contracts of the same kind with persons who sold this kind of sugar.

That being the course of business by the seller, the sugar to which the buyer would be entitled depended upon the distribution of the bills of lading according to the analysis, and the exact price which a buyer might have to pay depended, within certain small limits, upon that distribution. Then I will not believe that a man who had been dealing in the trade where that is the course of business did not know of it, especially where the sugar which he had to get, and in some measure the price which he had to pay, depended on that course of business. I therefore draw the inference that the plaintiff knew it.

If that be so, this course of business was known both to the plaintiff and to the defendant, and it seems to me to Beloe also, and to all persons who were dealing in sugar between Hamburg and Bristol.

Under those circumstances a contract in writing is made for the purchase of a certain quantity of sugar upon the terms "free on board," and the question is, what is the true construction of that contract made between two persons who both knew the course of business which I have described in that trade?

Now if the goods dealt with by the contract were specific goods, it is not denied but that the words "free on board," according to the general understanding of merchants, would mean more than merely that the shipper was to put them on board at his expense; they would mean that he was to put them on board at his expense on account of the person for whom they were shipped; and in that case the goods so put on board under such a contract would be at the risk of the buyer whether they were lost or not on the voyage.

Now that is the meaning of those words "free on board" in a contract with regard to specific goods, and in that case the goods are at the purchaser's risk, even though the payment is not to be made on the delivery of the goods on board, but at some other time, and although the bill of lading is sent forward by the seller with documents attached in order that the goods shall not be finally delivered to the purchaser until he has either accepted bills or paid cash.

Then the question arises, can there be a contract with the terms "free on board" which can be fulfilled without the delivery of specific goods at the time of shipment? Is there any mercantile or legal reason why a person should not agree to sell so much out of a bulk cargo on board or ex such a ship upon the terms that if the cargo be lost the loss shall fall upon the purchaser, and not upon the seller? I can see no reason why he should not; and if such a contract can be made, and in a contract to buy and sell a certain quantity ex ship or ex bulk there is put in the terms "free on board," one must, with regard to that contract, give some meaning to those words "free on board." What meaning can be given to them with regard to the unseparated part of the goods which is the subject-matter of the contract, but the same meaning as is given to those words with regard to goods attributed to the contract? What is there unreasonable or contrary to business or law in those words "free on board," meaning in such a contract "I sell you twenty tons out of fifty upon the terms that you shall pay such a price for those twenty, I paying the costs of the shipment, that is, 'free on board,' and you bearing the risk of whether they are lost or not?" It does not seem to me that there is anything more

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inconsistent with business or law that parties should make such a contract with regard to a portion of a cargo than that they should make it with regard to a whole cargo or with regard to a specific part of a cargo, and therefore the only question which remains is whether this is such a contract.

Now, taking into account the surrounding circumstances when the contract was made, those circumstances being the course of business known to both buyer and seller, it seems to me that both contracts of Drake & Co., the one with the plaintiff and the one with Beloe, were upon the terms that the buyer should pay for the sugar as it might be distributed or allocated to him when the bills of lading were offered to him, that he should be bound, if the goods arrived, to take those which were allocated to him, with this further term, that the seller should not run the risk of the arrival of the goods here, but that the buyer should be bound to pay the price against that allocation of the bills of lading whether the goods arrived or not. Therefore, if that be true, when Beloe sold to the plaintiff he sold in truth that contract, and then the plaintiff became not directly liable to Drake & Co., but liable to Beloe, to pay for the goods whether they arrived or not, and he was also liable to Drake & Co. to pay whether the goods arrived or not which he had contracted to buy of Drake & Co. If so, then upon the non-arrival of the goods he would suffer a money loss. That is obvious, and therefore the question which has been propounded about *Anderson* v. *Morrice* (1) does not arise. It is not only that he would not make a gain, but he would suffer a pecuniary loss.

Under these circumstances it seems to me that he has an insurable interest. The moment one thus arrives at what is the true construction of the contract the case falls within plain insurance rules. It is useless to go through the decisions and authorities in insurance law, because under these circumstances there cannot be a doubt but that there is an insurable interest. Therefore in my opinion our judgment ought to be in favour in the plaintiff.

BAGGALLAY, L.J. I am of the same opinion, and as the Master

(1) Law Rep. 10 C. P. 609; 1 App. Cas. 713.

of the Rolls has gone fully into the details of the case, I shall express my views very concisely.

I am of opinion that the appellant here is entitled to succeed upon this ground, that at the time of the loss the goods were at his risk.

The argument in support of that view of the case has been based upon two reasons, the one, the fact that the contract was for goods "free on board;" and the second, the general course of this particular kind of business.

It has not been denied that, where the contract deals with specified goods, the introduction of the provision that they are to be "free on board" places the goods at the risk of the buyer. But it has been suggested that such is not the case when the goods are not specific, but are, as they were in the present case, a certain proportion of goods to be delivered out of a larger quantity. I think the argument which was addressed to us by Mr. Reid in reply was a very forcible one. What authority is there for a suggested difference between the case of specific goods, and goods of the class which I have just now mentioned? Why should there be any difference between the two? No authority has been cited to shew that there is a difference. What reason is there then in law for a difference? I think it very difficult indeed to suggest any, though, before I was called upon to decide it, I should prefer to look a little more into the matter, but, if called upon to express an opinion at once, I should assent to the argument of Mr. Reid on this point. I prefer, however, to rest my decision in the present case upon the second contention, namely, as to the general course of business in relation to transactions of this kind—and I think it impossible to come to any other conclusion than that the distribution of the bills of lading, with reference to the analyses of the different sugars which were the subject of the different contracts, was the ordinary course of dealing in transactions of this character, and that both parties must be assumed to have been aware of it. Consequently, therefore, the goods were at the risk of the purchaser at the time of the loss, and he had an insurable interest for which he is entitled to claim.

LINDLEY, L.J. The action in this case is brought upon a

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policy effected upon goods, and the only question which we have to consider is, whether the plaintiff had an insurable interest in the goods so insured.

Now the plaintiff's interest, whatever it was, arises out of a contract, and the first point is to ascertain what is the meaning of that contract. The contract is for 200 tons of sugar free on board at Hamburg, the sugar to answer a certain description as regards saccharine matter, and the price to be paid in London in cash, in exchange for the bills of lading.

Let us look at that contract by itself, and without reference to any particular course of trade. No particular sugar is specified, but 200 tons of sugar, and I apprehend that that contract might be performed in one of two ways. 200 tons of sugar might be shipped "free on board" a vessel at Hamburg, and be shipped so as to be appropriated at the time of shipment. That is one mode of performing it. And I should say that would be the ordinary mode of performing it, and in that case, the sugar, provided it answered the description contracted for, would be appropriated at the time of shipment, and the property would then pass to the buyer, and of course would be at his risk.

But there is another way in which it seems to me this contract might be performed, and here it is that the only difficulty occurs to my mind, and it is a question of fact.

I understand the facts to be that Drake & Co., the sellers, who were one of the contracting parties, conducted their business in a particular way, and the plaintiff, who was a merchant at Bristol, and had had for a considerable number of years dealings with Drake & Co., knew their course of business. Drake's course of business in fulfilling contracts of this description was not always to appropriate the sugar to each buyer at the time of shipment, but to ship more than enough for any particular buyer—enough to satisfy all the contracts for sugar deliverable at a particular port; and then, after that shipment, to apportion the larger quantity so shipped between the buyers at that port.

It is plain that that was their course of business, and that the plaintiff was aware of it, to this extent at all events, that having had dealings with them for years, he had been in the habit of insuring what he bought the moment it was shipped. That is

plain. What is left in some obscurity is, whether the plaintiff did know that it was Drake's course of business to ship sugar for several customers in one ship, and then to appropriate to each customer a portion of the cargo so shipped; but upon the whole I come to the conclusion that I must draw the inference that the plaintiff knew this; and I shall therefore assume as a fact that the plaintiff did know that Drake & Co.'s course of business was to perform such contracts as this, not by appropriating sugar to each contract at the time of shipment, but by shipping enough sugar to satisfy the demands of all their buyers, and then to appropriate particular bags of sugar to each contract after shipment.

Under these circumstances the contract is one which might be performed according to the intention of both parties in the way in which Drake & Co. actually performed it, that is to say, they might ship 400 tons and more to answer the contract of the plaintiff and of Beloe, and of anybody else who had contracted for delivery of sugar at Bristol, and it would be in accordance with the course of business, and with the intention of both parties, that the quantity shipped to answer each contract should be at the risk of the buyer. That is perfectly intelligible, and there is nothing, so far as I can see, in point of law, to exclude the existence of such a contract as that.

It is said, however, that you cannot have a contract by which the goods are to be at the risk of the buyer, that is, that the buyer is to pay for the goods shipped, lost or not lost, unless those goods were appropriated to him when they were shipped. That seems to me too wide a proposition. I see no reason why a person should not agree to buy and pay for a portion of a cargo, say of sugar in bags or of corn in bulk, although the actual sugar or corn to be delivered may not be ascertained before the ship is unloaded. Whether the contract in this case is a contract of this description is a different matter; but I think it is, having regard to the course of business and the evidence, from which I infer that the plaintiff knew the mode in which such contracts were performed. Agreeing with Field, J., that there was no appropriation of goods so as to pass the property from Drake & Co. to the plaintiff, it appears to me that it was the intention of

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the parties that the 200 tons part of this cargo should be at the risk of the plaintiff. If that is once conceded there is no further difficulty in the case, because no authority was cited, nor could be, that a man who is liable to pay for goods has not got an insurable interest in them. *Anderson* v. *Morrice* (1) is not an authority against the proposition that a person has an insurable interest in goods if he is liable to pay for them whether he has the property in them or not.

Under those circumstances the plaintiff had, in my opinion, an insurable interest, and the judgment of Field, J., which proceeded almost entirely on the ground that he had no property in the goods, cannot be supported.

Judgment reversed.

Solicitors for plaintiff: *Hollams, Son, & Coward.*
Solicitors for defendant: *Bubb, Walton, & Bubb.*

W. P.

April 4.

[IN THE COURT OF APPEAL.]

THE SCHOOL BOARD FOR LONDON *v.* WRIGHT.

Elementary Education—School Board—Action to recover Fees for Tuition—Implied Promise to pay Fees—Action of Debt upon Statutes—Bye-laws—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75)—*Elementary Education Act*, 1873 (36 & 37 *Vict. c.* 86)—*Elementary Education Act*, 1876 (39 & 40 *Vict. c.* 79)—*Elementary Education Act*, 1880 (43 & 44 *Vict. c.* 23).

No action to recover arrears of fees for tuition can be maintained by a school board against the parent of a child attending a public elementary school; for, it being compulsory upon the parent to cause his child to attend a school, his act in sending the child to school is not voluntary, and no promise to pay the fees can be implied; and the Elementary Education Acts, 1870 to 1880, contemplate that the remedy to enforce payment of fees shall be by an attendance order and by summary proceedings before justices and not by action.

Saunders v. *Richardson* (7 Q. B. D. 388) approved.

APPEAL by the plaintiffs from the judgment of the Queen's Bench Division upon an appeal from the judgment of a county court.

(1) Law Rep. 10 C. P. 609; 1 App. Cas. 713.

The facts of the case are sufficiently stated in the judgment of the Court hereinafter set forth. The question of law to be determined in the action was, whether a school board can by action recover from a parent arrears of fees for the tuition of his child at a public elementary school.

Feb. 29. *Sir F. Herschell, S.G.*, and *Douglas Walker*, for the plaintiffs. First, the law will imply a promise by a parent to pay fees for the tuition of his child at a public elementary school. It is true that it is compulsory upon a parent to send his child to some school; but he has the choice of the school, and is not bound to send the child to a board school. If the child be sent to a private school, the law will imply a promise by the parent to pay reasonable charges; and there can be no difference if the parent selects a board school. The school board is not bound to keep a free school. Moreover, the compulsion exists only whilst the child is between certain years, or until he shall have attained a certain standard.

Secondly, if a child is sent to a public elementary school without paying the fees, an action of debt will lie. The school board has no other remedy for arrears. It is true that under an attendance order a parent is bound to send to the school the money for payment of the fees together with his child, and if he fails to do so, he may be punished summarily by penalties recoverable before justices: *Saunders* v. *Richardson* (1); but unless an action will lie for arrears of fees, the school board will be compelled to turn away a child who comes to the school without the money to pay the fees, and whilst proceedings before justices are being taken against the parent, the child will remain without education. An action of debt will lie whenever money is payable by statute: *Tilson* v. *Warwick Gas Light Co.* (2); and this remedy is not excluded by the fact that penalties also may be recovered: *Beckford* v. *Hood.* (3)

The defendant did not appear.

Cur. adv. vult.

(1) 7 Q. B. D. 388.

(2) 4 B. & C. 962.

(3) 7 T. R. 620.

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April 4. The judgment of the Court (Brett, M.R., Baggallay and Lindley, L.JJ.), was delivered by

BAGGALLAY, L.J. The question involved in this appeal is, whether a parent, who has caused his child to attend a board school, duly established under the provisions of the Elementary Education Acts, but has omitted to pay the prescribed fees in advance, can be sued in a county court for the arrears of such fees.

The action was commenced by the London School Board in the Westminster County Court, to recover from the defendant the sum of 1*s.* 6*d.* for school fees, alleged to be due from him for the tuition of his daughter in the James Street, Buckingham Gate school, which is an elementary public school, established by the plaintiffs within the school district of the metropolis.

Upon the trial of the action, the judge of the county court nonsuited the plaintiffs, upon the ground that arrears of board school fees were not a debt recoverable in an action; on the 5th of July last a rule which had been obtained in the Queen's Bench Division, requiring the defendant to shew cause why the nonsuit should not be set aside and judgment entered for the plaintiffs, or why a new trial should not be had, was discharged; but the Court was not unanimous; Denman and Manisty, JJ., holding that the rule should be discharged, whilst the Lord Chief Justice was of opinion that the judgment of the county court judge should be reversed.

From this judgment of the Divisional Court the present appeal has, by the leave of that Court, been brought.

On behalf of the school board the case was argued before us, as it had been in the Divisional Court, by the Solicitor General; but the defendant has not been represented by counsel, nor has the case been argued on his behalf, on either occasion.

In the course of his argument, it was contended by the Solicitor General—first, that apart from any obligation on the defendant under the provisions of the Elementary Education Acts, to cause his child to attend a board school, or other certified efficient school, the fact of his sending his child to such a school imposed

upon him an obligation to pay the reasonable charges for the tuition given; and, secondly, that the provisions of those Acts and the bye-laws made under them imposed upon the defendant an obligation to cause his child to attend an efficient elementary school, and that having thought fit to send her to the James Street school, he was under an obligation to pay the prescribed fees for her tuition, and, further, that having omitted to pay such fees in advance, he could be sued for the arrears in the county court. As between these two contentions, the Solicitor General stated that he prefered to rely upon the former; but, in the view which we take of the case, it will be more convenient to consider the latter first.

The question whether the second contention is well founded can only be solved by an examination of the Elementary Education Acts; they are four in number, viz., 33 & 34 Vict. c. 75, passed in 1870; 36 & 37 Vict. c. 86, passed in 1873; 39 & 40 Vict. c. 79, passed in 1876; 43 & 44 Vict. c. 23, passed in 1880. The object which the legislature had in view in passing these Acts is indicated by the preamble to that of 1876, in which it is declared to be expedient to make further provision for the "education of children and for the fulfilment of parental responsibility in relation thereto." The only sections of the Act of 1870 which we deem it necessary to examine in detail are those numbered 17, 25, 74, and 92; but it may be noted that by the sections previous to that numbered 17, provision is made for a supply of public elementary schools in the metropolis and elsewhere, and for the formation of school boards to discharge the several duties imposed upon them by the Act. Sect. 17 is in the following terms:—"Every child attending a school provided by any school board shall pay such weekly fee as may be prescribed by the school board, with the consent of the Education Department; but the school board may from time to time, for a renewable period not exceeding six months, *remit* the whole or any part of such fee, in the case of any child, when they are of opinion that the parent of such child is unable from poverty to pay the same." The weekly fee for girls attending the James Street school has been duly prescribed at 3*d*.

Sect. 25, though repealed by the Act of 1876, may be referred

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to in aid of the general interpretation of the Act of 1870; it provides that the school board, may, if they think fit, from time to time *pay* the whole or any part of the school fees *payable by any child*, resident in their district, whose parent is in their opinion unable from poverty to pay the same. This section, though repealed by the Act of 1876, is replaced by s. 10 of that Act, which substitutes the parish guardians for the school board as the authority by whom the school fees are to be paid in the case of any child whose parent is unable by reason of poverty to pay them.

Sect. 74 enacts that any school board may from time to time, with the approval of the Education Department, make bye-laws for all or any of the five several purposes therein mentioned, of which the first and fourth are in the following terms:— 1. Requiring the parents of children of such age, not less than five years nor more than thirteen years, as may be fixed by the bye-law, *to cause such children* (unless there is some reasonable excuse) *to attend school*: 4. Imposing penalties for the breach of any bye-laws. And by the same section (74) it was further enacted that "any proceeding to enforce any bye-law may be taken, and any penalty for the breach of any bye-law may be recovered *in a summary manner*, but no penalty imposed for the breach of any bye-law shall exceed such amount as, with the costs, will amount to five shillings for each offence, and such bye-laws shall not come into operation until they have been sanctioned by Her Majesty in Council." And s. 92 provides that any penalty which under the Act was made recoverable summarily, and all proceedings, which under the Act might be taken in a summary manner, might be recovered and taken before two justices, in manner directed by the statute 11 & 12 Vict. c. 43. The several sections of the Act of 1870, to which we have referred, are not expressed in as clear language as could be desired; the earlier portions of both s. 17 and s. 25 in terms refer to the school fees as being payable by the child attending the school, though the concluding portion of the former provides for the remission by the school board, and that of the latter for the payment by the school board of such fees, if, in their opinion, the parent of the child is unable to pay them. Sect. 74 also, though it provides means by which

the parent may be made responsible for the attendance of his child at school, and liable to penalties if such attendance is not given, makes no express provision for the payment by him of the school fees. Of the scope and effect of an Act so unsatisfactorily framed, it is difficult to form a confident opinion. It could not have been the intention of the legislature that the child should itself provide the means to pay the school fees; on the other hand, nothing would have been easier, had it been so intended, than to have imposed the obligation upon the parent in such terms as to enable the school board to sue for them if they were not paid; the language used throughout the Act is *suggestive* that it was the intention of the legislature that, in some way, the parent should be made responsible for the school fees; but *suggestion* is not sufficient to impose such an obligation as could be made the foundation of an action similar to that with which we are now dealing; especially, when there is a clear indication of the intention of the legislature that the responsibility of the parent should be declared and enforced by bye-laws. It will be observed that by the 73rd section of the Act provision is made for holding public inquiries for the purposes mentioned in the Act and for the payment of the costs of the proceedings by such parties as the Education Department may direct; and it is further provided that the costs, by whomsoever payable, may be recovered *as a debt*. The omission of any similar provision as to the recovery of school fees is significant. We pass on to consider the provisions of the Acts of 1873 and 1876. The only section in the Act of 1873 to which it is necessary to refer is that contained in sub-s. 3 of s. 24, by which it is enacted that "in any proceeding for an offence under a bye-law, the Court may, instead of inflicting a penalty, make an order directing that the child shall attend school, and that, if he fail so to do, the person on whom such order is made, shall pay a penalty, not exceeding the penalty to which he is liable for failing to comply with the bye-laws." In this section we see a somewhat inefficient provision for the making of an attendance order, for which, as will presently appear, more efficient provision is made by the Act of 1876; the principle, however, of punishing for disobedience of bye-laws, by the imposition of penalties of limited amount, is

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extended to an attendance, such as is provided for by the section just quoted. The sections of the Act of 1876, which demand our attention, are those numbered 4, 10, 11, and 12. By s. 4 it is enacted that "it shall be the duty of the parent of every child to cause such child to receive efficient education in reading, writing, and arithmetic, and that if such parent fail to perform such duty he shall be *liable to such orders and penalties as are provided by this Act.*" The language of the latter part of this section is very suggestive that it was by penalties, and by penalties alone, that performance of the duty imposed by the earlier part should be enforced. Sect. 10, as before mentioned, substitutes the parish guardians for the school board, as the authority, by whom the school fees are to be paid in the case of any child whose parent is unable by reason of poverty to pay them. But ss. 11 and 12 introduce further provisions for securing the attendance of children at school. By s. 11, it is provided that if the parent of any child, habitually, and without reasonable cause, neglects to provide efficient elementary education for his child, or if any child is found habitually wandering or not under proper control, it shall be the duty of the local authority (being the school board and school attendance committee, appointed as by s. 7 of the Act directed) to complain to a Court of summary jurisdiction, and such Court, if satisfied of the truth of such complaint, may order that the child shall attend some certified efficient school, and the child shall attend that school every time that the school is open or in such other manner as is specified in the order. And s. 12 provides that where an attendance order is not complied with, a *Court of summary jurisdiction,* on complaint made by the local authority, may impose a penalty not exceeding, with the costs, five shillings. These sections of the Act of 1876 effect little more than to make statutory provision for what could have been effected by bye-laws under the earlier Acts; but the principle which pervades the earlier Acts, of imposing penalties for disobedience and of limiting the amounts of such penalties and of the costs to which the offender might consequently become exposed, is as clearly indicated in the later Act. Since the passing of the Act of 1876, bye-laws have been duly made for the metropolis, under the powers conferred upon the London School Board,

by s. 74 of the Act of 1870, as amended by the Act of 1876; the bye-laws so made were in substitution for all bye-laws previously made, and were in force during the time that defendant's daughter attended the James Street school. The second of these bye-laws required that the parent of every child, if not less than five nor more than thirteen years, should cause such child to attend a certified efficient school, unless there was a reasonable cause for non-attendance; and the fourth provided that every parent who should not observe, or who should neglect or violate, the bye-laws then made, or any of them, should upon conviction be liable to a penalty not exceeding, with the costs, five shillings for each offence. What, then, having regard to the provisions of the several before-mentioned Acts, and to the bye-laws made under the powers conferred by them, was the position of the defendant at the time when his daughter was receiving tuition in the James Street school? Under the combined operation of s. 4 of the Act of 1876, and of the second bye-law, it was his duty to cause his daughter to attend a certified efficient school; she did *in fact* attend the James Street school, and receive tuition there for a period of six weeks; but did he cause her to attend such school within the intent and meaning of the Elementary Education Acts? He did not pay in advance, or at all, the prescribed weekly fee of threepence, and the action is brought to recover the fee for six weeks; it has not been suggested that he was unable by reason of poverty to pay the fees, or that he applied under s. 17 of the Act of 1870 to the school board to remit them, or, under s. 10 of the Act of 1876 to the guardians to pay them for him, or that there existed any other reasonable cause for his daughter's non-attendance. It must be assumed, then, at any rate for the purposes of the present appeal, that the defendant was able to pay the prescribed fees. Such being the position of the defendant, we are of opinion that it was his duty, when sending his daughter to the James Street school, to provide her with the means of paying (or in other words to pay for her) the prescribed school fees, which by s. 17 of the Act of 1870 she was in terms required to pay; and that, having neglected or failed to perform this duty, he did not *cause her to attend the school* within the intent and meaning of the Education Acts.

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This view of the duty of a parent able to pay in respect of the school fees payable for his child's attendance at a board school, is in accordance with that expressed by all the five judges who decided the case of *Saunders* v. *Richardson* (1) in the Queen's Bench, and is, in our opinion, supported by the language used in the Education Acts. If the defendant's daughter had been refused admission into the school, on the ground that she had not brought the weekly fee with her, we entertain no doubt but that, on his continued refusal to pay it, the defendant would have been liable to be convicted, under the fourth bye-law, for non-observance of the second. We gather, however, that not only was no objection taken to the admission of the defendant's daughter on the ground that the school fee had not been paid in advance, but that the defendant was in no way called upon to pay any fees at all, until after his daughter's attendance had ceased, when he was called upon to pay what have been termed the "arrears." We are of opinion that the plaintiffs have no right whatever to recover from the defendant the amount of fees so alleged to be due from him, and that this amount is not in fact due from him. If the plaintiffs had done that which it was within their power to do, they might have prevented his daughter from attending the school until he had paid the fees in advance, and he could have been punished by the imposition of penalties; but the provisions of the several Acts negative any intention on the part of the legislature that a parent should be sued for fees as for a debt, or that recourse should be had to any means to procure their payment, other than the imposition of penalties for neglect to pay them. The intention of the legislature to rely upon penalties as the means of securing the carrying out of the objects of the Acts is further evidenced by the Act of 1880, the title of which is "An Act to make further provision as to bye-laws respecting the attendance of children at school under the Elementary Education Acts." The 2nd section of that Act is as follows: "It shall be the duty of the local authority of every school district in which bye-laws respecting the attendance of children at school under s. 74 of the Act of 1870, are not at the passing of this Act in force, forthwith to make

(1) 7 Q. B. D. 388.

bye-laws *under that section* for such district," that is to say, bye-laws requiring the parent to cause his child to attend school, and imposing penalties for disobedience or neglect. It has evidently been an object of the legislature in framing the several Education Acts, to make the obligation upon parents to send their children to school as little burdensome as possible. The penalties for neglecting to discharge that obligation are made recoverable in a summary manner, and in no case is the amount of the penalty with the costs of imposing it to exceed five shillings for each offence. The liability to a penalty of this amount will in all ordinary cases be sufficient to induce a parent capable of paying threepence, to pay it; if he is unable to pay it, he can obtain remission, or have it paid for him in manner pointed out by the Acts; but, if a parent were allowed credit for the school fees with the consequent liability to be sued for arrears, the burden might become intolerable: the arrears might be small; but even if small, the cost of the proceedings to recover them would be out of all proportion to the amount at stake: moreover, it must be borne in mind that if an action lay on the statute in the technical sense of that expression, it might be brought at any time within twenty years after the right of action accrued, and the amount sued for might be a very serious sum for a poor person to pay quite irrespective of the costs. It is to be observed also, as was pointed out by Denman, J., in the Divisional Court that the word "parent," as used in the several Acts, includes a "guardian and every person who is liable to maintain or has the actual custody of any child," and consequently includes persons whose common law liability cannot be put so high as that of a father of a young child between the ages of five and thirteen. It would be contrary to the whole scheme of the Education Acts that credit should be given, and the legislature has acted wisely in limiting the means for enforcing payment to penalties of small amount to be recovered in a summary manner as inexpensively as possible. The conclusions at which we have arrived are that we assent to the first proposition involved in the contention of the Solicitor-General, that the defendant was under an obligation to cause his child to attend an efficient elementary school; that as regards his second proposition, that having thought fit to send her to the James Street

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school, he was under an obligation to pay the prescribed fees for her tuition, we assent to it to the extent that it was his duty to pay the fees in advance; but that we are unable to assent to his third proposition, that the defendant having omitted to pay the fees in advance, can be sued for the arrears.

It remains to consider the first contention of the Solicitor-General, that the fact of the defendant sending his child to a board school imposed upon him an obligation to pay the reasonable charges for the tuition given. If the sending his child to school had been a purely voluntary act of the defendant, like the sending her to the baker's shop for a loaf of bread, as sugggested by the Solicitor-General by way of illustration, there would have been great force in the argument, but we cannot regard his sending her to the James Street school as a purely voluntary act; he was under an obligation to cause her to attend a certified efficient school, unless there was a reasonable cause for non-attendance, which it is not suggested that there was; it does not appear whether the James Street school was the only certified efficient school within reasonable distance of his residence; if it was, he had no option in the matter; if it was not, then to the extent of his selection of the James Street school it was a voluntary act on his part; but thus far only, for, if he had not sent her there, he must have sent her to some other certified efficient school. The causing her to attend some certified efficient school was obligatory, but he may have had a power of selection as to the school to which he would send her. Under such circumstances his sending her to school was compulsory, and he did not in our opinion come under any obligation to pay for her tuition.

For these reasons the appeal must be dismissed.

Judgment affirmed.

Solicitors for plaintiffs: *Gedge, Kirby, & Millett.*

J. E. H.

N.B Headnote wrong !! See Dicey on Jacobs v Credit Lyonnais

[IN THE COURT OF APPEAL.]

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Feb. 23.

JACOBS, MARCUS & CO. *v.* THE CRÉDIT LYONNAIS.

Conflict of Laws—Construction and enforcement of a Contract made in England between Merchants residing there, for the delivery in London of Goods shipped at a foreign Port by a foreign Company—Vis major.

The defendants, a London firm, contracted in London to sell to the plaintiffs, merchants in London, 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port, at certain prices, according to specified qualities, on board vessels to be provided by the plaintiffs in London, and to be paid for by the plaintiffs in London by cash on or before arrival of the ship or ships at her or their port of destination, less interest at 5 per cent. per annum for the unexpired portion of three months from date of bill of lading, for the full amount of the invoice based on shipping weight.

The defendants caused to be delivered and were paid for 9000 tons of esparto, but failed to deliver the remaining 11,000 tons.

In an action for this breach of contract:—

Held, affirming the judgment of the Queen's Bench Division, that the contract was an English contract, and to be construed and dealt with according to the law of this country; and, consequently, that it was no answer to say that by the French law (which prevailed at the port of shipment) the defendants were excused from performing their contract if prevented from so doing by "force majeure," viz., the prohibition by the constituted authorities of the export of esparto from Algeria, by reason of an insurrection and consequent hostilities in that country.

STATEMENT OF CLAIM. 1. The plaintiffs are esparto merchants carrying on business in London. The defendants are a banking company also in London.

2. By a contract made in London on the 6th of October, 1880, the defendants agreed to sell to the plaintiffs and the plaintiffs agreed to buy of the defendants 20,000 tons of Algerian esparto upon the terms contained in a letter or contract signed by the defendants' agents, as follows:—

To Messrs. Jacobs, Marcus, & Co., London.

We have this day sold to you by order and for account of the Crédit Lyonnais, London Agency, twenty thousand (20,000) tons Algerian esparto in hydraulically pressed iron-hooped bales, with a fair proportion of loose, if necessary, for stowage, to be shipped by the Compagnie Franco-Algerienne or their agents from Arzew $\frac{\text{and}}{\text{or}}$ any other port with safe anchorage and where steamers can load afloat, by sailing ships $\frac{\text{and}}{\text{or}}$ steamers, during the year beginning

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1st January, 1881, and ending 31st December, 1881, as much as possible in about equal proportions in each month.

(1.) The price to be 5*l.* 4*s.* if equal to "fair average;" 5*l.* 14*s.* if equal to "good average," and 4*l.* 14*s.* if equal to "inferior;" such price being per ton of 1015 kilogrammes Arzew shipping weight, less a draft of 2 per mille allowed in the invoice, taken free on board Algeria, without discount.

(2.) The quality of each classification to be established by standard samples made up for the purpose conjointly by yourselves and the Compagnie Franco-Algerienne on or before 31st December.

(3.) The quality of esparto tendered against this contract to be finally approved of by you or your representatives at the works of the Compagnie Franco-Algerienne at Ain-el-Hadjar before being baled, and no claim respecting quality will be allowed after delivery of the bales at Arzew. You undertake in your name and in the names of your representatives that, with the exception of approving the quality tendered as above, no interference of any kind as regards the company's business will be allowed,

(4.) Notice in writing will be given to you in the first week of each month of the quantity of each classification, which the Compagnie Franco-Algerienne will be ready to deliver to you in the following month. The first notice to that effect will be given to you on or before the 15th of December, 1880. The quantity of esparto thus tendered will have to be taken delivery of by you at or before the end of the second week of the then ensuing month, viz., on or before the 14th of February for the January delivery, on or before the 14th of March for the February delivery, and so on.

(5.) You have to provide the necessary ships or steamers to take delivery at the rate not exceeding 50 tons per working day, weather permitting, Sundays and holidays excepted, for sailing ships, or 100 tons per working day as above specified for steamers.

(6.) Should you fail to provide the necessary ships or steamers and to take delivery of the esparto or part thereof at or before the time specified as above, the esparto will be warehoused by the Compagnie Franco-Algerienne at your peril and risk, and you will have to accept our drafts at three months from that date for the full amount of our invoice, the Compagnie Franco-Algerienne charging you rent at the rate of 3*d.* per ton per month, and the goods will be insured by us against fire at your expense. If shipped before maturity of the drafts, you can get possession of the bills of lading by paying these drafts under discount at 5 per cent. per annum.

(7.) The sailing-ships or steamers which you will charter in fulfilment of this contract must await their regular turn for loading their cargoes at Arzew, if there are three ships or steamers already loading on their arrival, without being entitled to any charge for demurrage.

(8.) Any advances made according to charterparties or by your authority to the captains of the ships or steamers chartered by you must be refunded to us by cash on the production of the respective receipts.

(9.) The marine insurance will be effected by us for the invoice amount at selling price and 2 per cent. over, in the United Kingdom, on the usual English conditions, free of particular average, unless stranded, sunk, or burnt.

(10.) The premium is to be included in the provisional invoice, and to be settled with it.

(11.) If the insurance is covered for a larger amount than stipulated above on any of the cargoes forming part of this contract, the rights deriving from such additional insurance are to be our exclusive benefit.

(12.) We are not responsible for underwriters' solvency.

(13.) The payment will be made by cash on arrival of the ship (or ships), or steamer (or steamers) at her (or their) port of destination, less interest at 5 per cent. per annum for the unexpired portion of three months from date of bill of lading for the full amount of the invoice based on shipping weight.

(14.) Each separate shipment effected on the strength of this contract to be considered as a separate contract, and settled accordingly.

(15.) Should any ship (or ships) or steamer (or steamers) with a cargo of esparto forming part of this contract be totally lost, this contract to be void for such part. Should any ship (or ships) or steamer (or steamers) be lost, and the cargo or any part thereof be saved and brought forward by another craft, then the cargo will have to be taken delivery of by you on the terms above specified, in part fulfilment of this contract.

(16.) Should any dispute arise respecting this contract, the same is not to be vitiated thereby, but such dispute is to be settled by arbitration by two neutral persons familiar with the esparto trade and its customs, respectively chosen, with power to call in an umpire, whose decision is to be final; and this stipulation to be made equal to a rule of any of the Divisions of the High Court of Justice, London, on the application of either contracting party.

p.p. J. C. Im Thurn & Co.
P. E. Conradi.

3. By another letter or memorandum dated the 9th of March, 1881, signed by the agents of the defendants, it was agreed in London between the plaintiffs and the defendants that the terms of the contract of the 6th of October, 1880, should be modified to the extent appearing in the said letter or memorandum, which was as follows,—

London, 9th March, 1881.

J. C. Im Thurn & Co. telegram Im Thurn, London.

It has been mutually agreed to-day between Messrs. Jacobs, Marcus, & Co. and the Crédit Lyonnais (London agency) that their contract dated 6th of October, 1880, will begin to enter into vigour with this day instead of the 1st of January, 1881, and will terminate on the 28th of February, 1882. Further, that, of the total quantity of 20,000 tons sold by said contract, the Company Franco-Algerienne is to deliver at least 2000 tons of good average, 11,000 tons of fair average, without exceeding 7000 tons of inferior esparto. All the other conditions of said contract to remain in force.

On behalf of the Crédit Lyonnais (London Agency),
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4. England is the only country to which esparto of the qualities mentioned in the said contract so modified as aforesaid, is shipped from Arzew and other ports in Algeria.

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5. The defendants made the first monthly delivery of the quantity provided by the contract so modified as aforesaid in the month of March, 1881, in accordance with the terms thereof; but the defendants failed either wholly or in part to give notice of the subsequent monthly deliveries or to make delivery of the several quantities as provided by the contract so modified as aforesaid.

6. The total quantities delivered by the defendants, in respect of some of which notices were from time to time given by the defendants' said agents to the plaintiffs in London, were as follows:—

	Tons	cwt.	qrs.	lbs.
Good average	1236	10	1	9
Fair average	3889	18	3	24
Inferior	3850	17	2	2
Making a total of	8977	6	3	7

leaving the following quantities of the respective qualities undelivered:—

	Tons	cwt.	qrs.	lbs.
Good average	763	9	2	19
Fair average	7110	1	0	4
Inferior	3149	2	1	26
Making a total of	11,022	13	0	21

7. All the said quantities delivered by the defendants as aforesaid were insured by the defendants in London, and were shipped to the United Kingdom in ships or steamers chartered by the plaintiffs in London, and paid for by the plaintiffs in London by cash on or before arrival, in accordance with the terms of the contract.

8. By reason of the defendants' several breaches of contract, the plaintiffs were unable to complete certain contracts into which they had entered for the re-sale of the said esparto, and had to purchase other esparto at increased prices, &c.

Statement of defence. 1. The defendants admit the allegations in paragraphs 1, 2, 3, and 4 of the statement of claim.

2. The defendants admit that they did not in fact deliver more esparto than the quantity mentioned in par. 6 of the statement

of claim: but they say that by the law which prevailed at the time of the making of the contracts sued on, and still prevails, in Algeria (being, as the defendants contend, the country where the acts for the non-performance of which this action is brought were by the said contracts contracted to be done), no damages are recoverable for the said non-performance of the contracts, by reason of the matters hereinafter stated.

3. The Compagnie Franco-Algerienne mentioned in the contracts had at the time of the contracts (as was known to the plaintiffs as well as to the defendants) a concession for the collection of esparto within a large district the whole of which was in Algeria. Their works at Ain-el-Hadjar are within that district. Arzew is in Algeria, and all other ports from which either the esparto of the Compagnie Franco-Algerienne or any other Algerian esparto is ever shipped, or from which it can be shipped, are in Algeria.

4. Throughout Algeria the law of the French civil code prevails and is applicable to mercantile contracts such as those set forth in the statement of claim.

5. The said code contains the following sections:—

§ 1147. Le débiteur est condamné, s'il y a lieu, au paiement de dommages et intérêts, soit à raison de l'inexécution de l'obligation, soit à raison du retard dans l'exécution, toutes les fois qu'il ne justifie pas que l'inexécution provient d'une cause étrangère qui ne peut lui être imputée, encore qu'il n'y ait aucune mauvaise foi de sa part.

§ 1148. Il n'y a lieu à aucuns dommages et intérêts, lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit.

7. During the time when the contract sued on should have been performed there was an insurrection in Algeria, and military operations were going on, and commands were issued by persons in authority preventing the collection and transport of esparto. Some of the esparto of the Companie Franco-Algerienne intended for delivery to the plaintiffs was burnt, and the servants or agents employed in carrying on works towards fulfilling the contract sued on were in some cases killed, in other cases maltreated, driven away from their work, and prevented working. By the said matters so happening in Algeria, and by other matters arising out of the said insurrection, and all of which amount to

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force majeure within the law of Algeria, the Compagnie Franco-Algerienne was prevented from procuring for shipment to the plaintiffs and from shipping to them any more esparto than was in fact shipped to them, and the defendants were prevented from performing their contract with the plaintiffs any further than they did perform it.

8. The defendants do not admit the damages alleged in the statement of claim.

Demurrer and reply. 1. The plaintiffs demur to paragraphs 2 to 7, inclusive, of the statement of defence, on the ground that the contracts are governed by English law, and not by the law of Algeria.

2. Further, as to par. 7, the plaintiffs say that the defendants or their agents could have procured in other parts of Algeria where force majeure did not exist, Algerian esparto of the qualities mentioned in the contracts for shipment to the plaintiffs, and could have shipped the same from Arzew $\frac{\text{and}}{\text{or}}$ other ports in Algeria in performance of the contracts.

Rejoinder. That, if the defendants or their agents had procured in parts of Algeria where force majeure did not exist Algerian esparto of the qualities mentioned in the contract, the transport of any such esparto so procured elsewhere to the works of the Compagnie Franco-Algerienne at Ain-el-Hadjar for the purpose of being there approved according to clause 3 of the contract before being baled, and also the transport thereof to Arzew for shipment (though, as the defendants admit, not the transport from the places where such esparto might have been procured to all other ports in Algeria), would have been and in fact was rendered wholly impossible by reason of the force majeure existing at and in the neighbourhood of Ain-el-Hadjar and over a large part of Algeria, by which force majeure the transport of esparto both to and from Ain-el-Hadjar and to Arzew was during all the time material in this action prevented.

Demurrer to the rejoinder, on the ground that the impossibility of transporting the esparto to Ain-el-Hadjar, and of getting the same approved there before being baled, and also of transporting the same to Arzew for shipment, did not exonerate the defendants from the performance of the contracts. Joinder.

1883. July 2. *Forbes, Q.C.*, for the plaintiffs. The statement of defence affords no answer to the action. The contract for the breach of which the plaintiffs are suing is an English contract, made between merchants, both of whom carry on business in London, for the delivery by the defendants' agents in Algeria on board ships to be chartered by the plaintiffs, of a large quantity of esparto consigned to the plaintiffs in London. All the authorities both ancient and modern shew that under such circumstances the contract as to its construction and all its incidents is to be governed by the law of the country where it is made, unless it appears upon the face of the instrument itself, or from the surrounding circumstances, that the parties intended otherwise: see *Atkinson* v. *Ritchie* (1); *Sjoerds* v. *Luscombe* (2); *Splidt* v. *Heath* (3); *Barker* v. *Hodgson* (4); *Chartered Mercantile Bank of India, &c.* v. *Netherlands India Steam Navigation Co.* (5)

[MANISTY, J. The principle was clearly laid down by the Court of Appeal in the case last cited. The intention of the parties is the crucial test.]

Sir F. Herschell, S.G. (*Channell* with him), for the defendants. The proposition contended for on the part of the defendants is that which is laid down in Westlake's Private International Law, p. 156, § 167, as deduced from a passage in Bartolus Com. in Cod., lib. 1, tit. 1, l. 1 (6),—"If the parties stipulate for the performance of their contract at a certain place, it is by the law of that place, as that where the omission to perform is committed, that the obligations flowing from non-performance must be ascertained." Where a contract is made in one country, to be performed (as here) in another, as to the matters to be performed in that country, the contract is to be governed by the law of that place: see Story's Conflict of Laws, § 280; and see *Robinson* v. *Bland* (7); *Cohen* v. *South Eastern Ry. Co.* (8); *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (9).

DENMAN, J. I am of opinion that this demurrer must prevail,

(1) 10 East, 530.
(2) 16 East, 201.
(3) 2 Camp. 57, n.
(4) 3 M. & S. 267.
(5) 9 Q. B. D. 118; 10 Q. B. D. 521.
(6) Cited in *Scott* v. *Pilkington*, 2 B. & S. at p. 39.
(7) 2 Burr. 1077.
(8) 2 Ex. D. 253.
(9) 3 Moo. P. C. (N.S.) 272.

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Denman, J.

the defence set up not being good in point of law. The substance of the pleadings is this:—The defendants, a London firm, contract in London to sell to the plaintiffs, merchants in London, a large quantity of Algerian esparto, to be shipped by their agents, a foreign company, at Arzew, or other safe and convenient port in Algeria, in vessels provided by the plaintiffs. The contract contained special provisions as to price, mode of weighing and packing, and terms of payment, insurance, &c. In pursuance of this contract the defendants' agents, the Compagnie Franco-Algerienne, delivered about 9000 tons of esparto on board vessels chartered by the plaintiffs in London, which were paid for by the plaintiffs; but the balance of 11,000 tons remained undelivered. The statement of defence admits that the defendants did not deliver on board the vessels provided by the plaintiffs more esparto than the quantity mentioned in the statement of claim, but alleges (in par. 2) that by the law which prevailed at the time of the making of the contract sued upon, viz., the French Code Civile, articles 1147, 1148, and which still prevails in Algeria, the country (as the defendants contended) where the acts for the non-performance of which the action was brought, were by the contract contracted to be done, no damages were recoverable for the said non-performance of the contract, by reason of the matters thereinafter mentioned. These matters are set out in par. 7, but there is no allegation that either party contemplated this state of things. Here is a simple contract by merchants in London with merchants also carrying on business in London, that third persons, a French company carrying on business in Algeria, shall ship at a port in Algeria on board vessels to be provided by the plaintiffs certain goods to be delivered to the plaintiffs in London. The authorities cited, of *Peninsular and Oriental Navigation Co.* v. *Shand* (1), and *Chartered Mercantile Bank of India, &c.*, v. *Netherlands India Steam Navigation Co.* (2), shew that the general rule is, that, where a contract is made in England between merchants carrying on business here, as this is, but to be performed elsewhere, the construction of the contract, and all its incidents are to be governed by the law of the country where the contract is made, unless there is something to

(1) 3 Moo. P. C. (N.S.) 272. (2) 9 Q. B. D. 118; 10 Q. B. D. 521.

shew that the intention of the parties was that the law of the country where the contract is to be performed should prevail. Looking at the nature of this contract, what is there to shew that the intention of the parties was that the defendants should be relieved from the performance of their contract by reason of difficulties arising out of circumstances which were unforeseen? The result of the cases seems to me to be that the English and not the French law must govern this case, and therefore that the demurrer must be allowed.

MANISTY, J. I am of the same opinion. This is an absolute contract made between two merchants in London for the delivering of merchandise at a foreign port for conveyance to this country. Are we at liberty to say that the vendors are to be excused from performing their contract because its performance has become difficult, or impossible, by reason of hostilities having broken out in the country whence the goods are to come? I think not. Turner, L.J., in delivering the judgment of the Court in *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (1), says: — "Every one who is but moderately familiar with the text-books and decisions must know how easy it is to produce authorities on either side, when the question is by what law to interpret a contract made in one country and to be performed wholly or partly in another. But, if these be carefully examined, it will be found after all that the same general principles have for the most part prevailed throughout, and that, where the conclusions vary, they do so from distinctions more or less minute in the facts. The general rule is, that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance; in either case equally they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact presumed de jure, and a foreign Court interpreting or enforcing it on any contrary rule defeats the

(1) 3 Moo. P. C. at p. 290.

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intention of the parties, as well as neglects to observe the recognised comity of nations." After all, the real question is, as it is put by Lindley, L.J., in *Chartered Mercantile Bank of India, &c.*, v. *Netherlands India Steam Navigation Co.* (1), what was the intention of the parties. What is there here to lead us to suppose that it even entered the minds of these parties, that any other law than that of the country where the contract was made, should govern its construction? There being nothing, then, to take this case out of the general rule, the general rule must prevail, and the demurrer must be allowed.

Judgment for the plaintiffs.

J. S.

The defendants appealed.

1883, Nov. 9. Sir *F. Herschell, S.G.*, and *Channell*, for the defendants.

Sidney Woolf, for the plaintiffs.

The following authorities were referred to in the course of the argument:—*Rouquette* v. *Overmann* (2); *Medeiros* v. *Hill* (3); *Chamberlain* v. *Napier* (4); *Greer* v. *Poole* (5); *The Halley* (6).

Cur. adv. vult.

1884. Feb. 23. The judgment of the Court (Brett, M.R., and Bowen, L.J.) was delivered by

BOWEN, L.J. The plaintiffs in this case are esparto merchants carrying on business in the city of London, and the defendants are a banking firm also carrying on business in the City.

By a contract made in London on the 6th of October, 1880, the defendants agreed to sell to the plaintiffs 20,000 tons of Algerian esparto, to be shipped from Algeria during the year 1881 by monthly deliveries on board ships or steamers to be provided by the plaintiffs, payment to be made by cash on arrival of the ship or steamer at her port of destination. The

(1) 10 Q. B. D. at p. 540.
(2) Law Rep. 10 Q. B. 525.
(3) 8 Bing. 231.
(4) 15 Ch. D. 614.
(5) 5 Q. B. D. 272.
(6) Law Rep. 2 P. C. 193.

defendants delivered a portion of the esparto under the contract, but failed to deliver the remainder; and this action was brought by the plaintiffs for its non-delivery. The defendants in their statement of defence admitted the non-delivery complained of, but alleged that the insurrection in Algeria and the military operations connected with it had rendered the performance of the contract impossible; and that by the French Civil Code, which prevails throughout Algeria, "force majeure" is an excuse for non-performance. The plaintiffs demurred to this defence on the ground that the contracts were governed by English law and not by the law of Algeria, and further alleged that the defendants or their agents could have procured and shipped esparto from other parts of Algeria where "force majeure" did not exist. The defendants to the latter allegation rejoined that the insurrection and military operations rendered it impossible to transport such esparto as last mentioned to the place fixed in the contract for approval by the plaintiffs of its quality before shipment, or to transport the same to the place fixed in the contract for shipment. To this rejoinder there was a further demurrer upon similar grounds. The Queen's Bench Division having given judgment upon both demurrers for the plaintiffs, the case now came before us upon appeal.

The question which we have in substance to consider is, whether non-performance of their agreement by the defendants can be excused on the ground that military operations in Algeria and the Algerian insurrection had rendered its performance impossible, and that such an excuse would have been recognised by the French Civil Code which prevails in Algeria, in conformity with the following section as translated from the French: "There is no ground for any damages when by means of a superior force or an accident the obligor has been prevented from giving or doing that which he was bound to give or do, or has done that which he was not bound to do." The first matter we have to determine is, whether this contract is to be construed according to English law or according to French. To decide this point we must turn to the contract itself, for it is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts. What is

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to be the law by which a contract, or any part of it, is to be governed or applied, must be always a matter of construction of the contract itself as read by the light of the subject-matter and of the surrounding circumstances. Certain presumptions or rules in this respect have been laid down by juridical writers of different countries and accepted by the Courts, based upon common sense, upon business convenience, and upon the comity of nations; but these are only presumptions or primâ facie rules that are capable of being displaced, wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction. The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties. "The general rule," says Lord Mansfield, "established ex comitate et jure gentium is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties at the time of making the contract had a view to a different kingdom": *Robinson* v. *Bland* (1): (see *Peninsular and Oriental Steam Navigation Co.* v. *Shand*). (2) This principle was explained by the Exchequer Chamber in the case of *Lloyd* v. *Guibert* (3), as follows: "It is generally agreed that the law of the place where the contract is made is primâ facie that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immoveable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances so far as they are relevant to construe and deter-

(1) 1 W. Bl. 258. (2) 3 Moo. P. C. (N.S.) 291.
(3) Law Rep. 1 Q. B. 122.

mine the character of the contract." It is obvious, however, that the subject-matter of each contract must be looked at as well as the residence of the contracting parties or the place where the contract is made. The place of performance is necessarily in many cases the place where the obligations of the contract will have to be enforced, and hence, as well as for other reasons, has been introduced another canon of construction, to the effect that the law of the place of fulfilment of a contract determines its obligations. But this maxim, as well as the former, must of course give way to any inference that can legitimately be drawn from the character of the contract and the nature of the transaction. In most cases no doubt where a contract has to be wholly performed abroad, the reasonable presumption may be that it is intended to be a foreign contract determined by foreign law; but this primâ facie view is in its turn capable of being rebutted by the expressed or implied intention of the parties as deduced from other circumstances. Again, it may be that the contract is partly to be performed in one place and partly in another. In such a case the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law; or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to English law. Stereotyped rules laid down by juridical writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity: and there can be no hard-and-fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal. In the present case the contract was made in London between merchants carrying on their business in the city of London, and payment was to be made in London. Presumably, therefore, we should infer that this was an English contract and intended to be

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governed by English law; but it still remains to be considered whether anything in the contract itself or the nature of its stipulations displaces this primâ facie view either wholly or in part. Now it cannot be contended that the parties have in express terms provided that any portion of this contract is to be construed or applied otherwise than according to English law; but it was suggested by the appellants that such an intention ought to be inferred from certain provisions as to the collection of the esparto in Algeria and as to its shipment thence. The esparto was to be shipped by the Compagnie Franco-Algerienne, or their agents, from Arzew, or any other port with safe anchorage, by sailing ships or steamers during the year 1881. The quality of the esparto was to be finally approved by the plaintiffs' representatives at the works of the Compagnie Franco-Algerienne, at Ain-el-Hadjar, in Algeria, before being baled, and no claim respecting quality was to be allowed after the delivery of the bales at Arzew. The necessary ships or steamers were to be supplied by the plaintiffs, otherwise the esparto was to be warehoused by the Compagnie Franco-Algerienne at the plaintiffs' peril and risk. Insurance was to be effected by the defendants for the invoice amount at selling price, and 2 per cent. over in the United Kingdom on the usual conditions. Payment to be made by cash on arrival of the ship or steamer at port of destination. Finally the contract contained an arbitration clause, with a provision that it should be made a rule of the High Court of Judicature on the application of either of the contracting parties.

There is absolutely nothing in any part of this contract, as it appears to us, which can amount to an indication that it is in any way or in any part of it to be treated as anything except an English contract, unless it be the mere fact that the esparto is to be collected in Algeria, approved at the works of a French company in Algeria before shipment, and to be delivered on board ships of the plaintiffs at an Algerian port, after which it is to be at plaintiffs' risk. To hold that on this ground only the ordinary presumption is to be displaced, and that the parties must have meant some law other than the English to govern the construction of any portion of the contract as regards the liabilities of the contracting parties, would be to introduce a serious element

of uncertainty into mercantile contracts. The mere fact that a contract of this description,—made in England between English resident houses, and under which payment is to be made in England upon delivery of goods from up country in an Algerian port,—is partly to be performed in Algeria, does not put an end to the inference that the contract remains an English contract between English merchants, to be construed according to English law, and with all the incidents which English law attaches to the non-performance of such contracts.

Now one of the incidents which the English law attaches to a contract is that (except in certain excepted cases as that of common carriers and bailees, of which this is not one,) a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by vis major.

"The rule laid down in the case of *Paradine* v. *Jane* (1) has often," says Lord Ellenborough, "been recognised in courts of law as a sound one; that when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract" (2). See also *Spence* v. *Chodwick* (3); *Lloyd* v. *Guibert* (4). If inevitable necessity occurring in this country would not excuse non-performance, why should non-performance be excused on account of the inevitable necessity arising abroad? So to hold would be to alter the liability which English law attaches to contracts, and would, in the absence of an expressed or implied intention to that effect, be contrary to authority as well as principle, see *Barker* v. *Hodgson* (5); *Sjoerds* v. *Luscombe* (6). The Solicitor-General, in his argument, admitted that he was driven to contend that the law of the place of fulfilment not merely governed the mode of performance of this particular contract, but governed also the obligations in respect of performance, and the liabilities in respect of non-performance of it. It seems to us, however, that

(1) Aleyn, 27.

(2) *Atkinson* v. *Ritchie*, 10 East, 530, at p. 533.

(3) 10 Q. B. 530.

(4) Law Rep. 1 Q. B. 121.

(5) 3 M. & S. 267.

(6) 16 East, 201.

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the true principles of construction to be applied do not admit of this interpretation of this contract. To what extent foreign law is to be incorporated in any contract must be, as we have said, a question of construction of the contract itself read by the light of the surrounding circumstances. If a contract made in England by English subjects or residents, and upon which payment is to be made in England, has to be performed in part abroad, it might not be unreasonable to assume that the mode in which any part of it has to be performed abroad was intended to be in accordance with the law of the foreign country, and to construe the contract as incorporating silently to that extent all provisions of a foreign law which would regulate the method of performance, and which were not inconsistent with the English contract. But it cannot be gathered from such a contract as the present that the parties desired to go further and to discharge the defendants from performance whenever circumstances arose which would, according to foreign law, excuse them. The contract has absolutely provided that delivery of the esparto shall be duly made, not that the bargain as to such delivery need only be observed when the foreign law would insist upon such observance. The contract being an English contract, only such portions of the French Civil Code can be applied to its provisions as to performance in Algeria as are not inconsistent with the express language of the contract as interpreted according to English law. If the parties had wished, in addition to this, to incorporate a provision of French law which in the event of vis major would operate to excuse the contracting parties for non-performance, and thus to vary the natural construction of the instrument according to English law, they should have done so in express terms. Read by English law the contract is not susceptible of such an interpretation, and there is nothing to shew that in this respect the parties desired the contract to be governed by the French.

For these reasons we are of opinion that the judgment of the Court below was right and must be affirmed with costs.

Judgment affirmed.

Solicitor for plaintiffs: *Conrad J. Davis.*
Solicitors for defendants: *Nicol, Son, & Jones.*

J. E. H.

THE ATTORNEY GENERAL *v.* BIRKBECK AND OTHERS.

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Feb. 9.

Banker—Bank Notes, Issue of—Penalties—The Bank Charter Act, 1844 (7 & 8 *Vict. c.* 32), *ss.* 11, 12.

By s. 11 of the Bank Charter Act, 1844, it shall not be lawful for any banker to "issue" any note payable on demand, except that any banker carrying on business as such on the 6th of May, 1844, and then lawfully issuing his own notes, may continue to issue them under specified conditions; and, by s. 12, if any banker, entitled after the passing of the Act to issue bank notes, "shall cease to carry on the business of a banker," it shall not be lawful for him to issue such notes at any time thereafter. In 1880 a firm of bankers, entitled to issue their own notes under the exception in s. 11, sold their business to a limited liability company upon the following terms:—The company took over the whole of the business as a going concern, and the goodwill, except and reserving to the firm the right to issue their own notes, but including in the sale and purchase such benefit of the issue as was thereby agreed to be given to the company; the firm were to issue their notes in the same form as theretofore, but through the company's officers only, and might nominate those officers and make the returns required by statute through them: the company were to allow and pay the firm 2*l.* per cent. interest on the amount of all notes from time to time in circulation: for the purposes of the issue only the firm might continue to use their accustomed name, but they were not to assign their rights, nor to take new partners for the purpose of continuing the issue without the consent of the company, nor to carry on the business of banking within a defined district without the like consent, except so far as related to the issue of their notes under the agreement: if the right of issue should at any time be taken away from the firm they were to pay any compensation they might receive to the company, unless the company should get an equal right of issue, in which case the firm might retain the compensation: if the company acquired a right to issue their own notes, the firm's right of issue was to cease. When the business was taken over by the company, a large number of the firm's notes being in circulation, the amount of them was deducted from the purchase-money, and the notes, when presented for payment, were cashed by the company, and reissued by them. Notes in hand when the business was taken over were treated as cash lent by the firm to the company. Daily returns were made by the company shewing the number of the firm's notes in circulation, and twice a year the company paid 2*l.* per cent. interest to the firm on the amount so ascertained. On an information against the firm and the company for penalties in respect of their having issued the notes contrary to the provisions of the Act:—

Held, that the company had "issued" the notes within the meaning of s. 11 of the Bank Charter Act, 1844; that the firm, in issuing the notes, were not protected by the exception in s. 11, because after the making of the agreement they had "ceased to carry on the business of bankers" within the meaning of s. 12; and therefore that all the defendants were liable.

INFORMATION by the Attorney General against J. Birkbeck and others, members of the firm of Birkbeck, Robinson, & Co.,

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and against the Craven Bank, Limited, for penalties under s. 47 of the Stamp Act, 1870 (33 & 34 Vict. c. 97.)

The facts and arguments are stated in the judgment.

Sir H. James, A.G., Sir F. Herschell, S.G., R. S. Wright, and *W. O. Danckwerts,* for the Crown.

R. E. Webster, Q.C., E. H. Pollard, and *H. E. Stansfeld,* for the defendants.

Cur. adv. vult.

Feb. 9, 1884, the judgment of the Court (Lord Coleridge, C.J., and Stephen, J.) was read by

LORD COLERIDGE, C.J.:—This was an information for penalties under the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 47 (1), filed against the defendants under the following circumstances:—

The firm of Birkbeck & Co., otherwise known as the Craven Bank, carried on the business of bankers in Yorkshire for a great many years previous to 1880, and from the year 1791 they issued notes which, subsequently to 1844, were for 5*l.* only. In 1880 the defendants, who then represented the firm, transferred their banking business to a limited liability company called the Craven Bank, Limited. This was effected by a written agreement of which the following provisions appear to us material to the decision of the present case:—

By article 1 the vendors agreed to sell and the company to purchase and take over "the whole of the said business of the Craven Bank Company and of Birkbeck, Robinson, & Co., as a going concern, and the goodwill thereof, except and always reserving to the vendors their right to issue their own bank-notes, but including in the said sale and purchase such benefit of the said issue as is hereby agreed to be given to the company."

By article 7 it was agreed as follows:—"If circumstances permit, the vendors shall for a period not exceeding five years, and may for a longer period, continue to issue their own notes in the same form as heretofore, but through the officers of the

(1) If any banker, not being duly licensed or otherwise authorized to issue unstamped bank notes, issues, or causes or permits to be issued, any bank note not being duly stamped, he shall forfeit the sum of 50*l.*

company only; and the vendors for that purpose shall from time to time nominate such clerks or officers of the company as they the vendors shall think fit, and shall make the returns required by statute through such clerks or officers. The company shall allow the vendors interest at the rate of 2*l.* per cent. per annum on the amount of all notes from time to time in circulation. The account between the vendors and the company in respect of the issue shall be stated, and a balance struck, on the 30th day of June and the 31st day of December in every year, and the amount found due shall be thereupon paid, after deducting therefrom all the expenses of the issue. For the purposes of the issue only the vendors may continue to use the names of their said firms, or such name as has been hitherto accustomed; but the rights of the vendors shall not be assigned, but shall pass only to the surviving or continuing partners or partner: Provided always that a new partner or new partners shall from time to time be admitted on like terms for the purpose of continuing the issue of notes, but not without the consent of the company."

Article 10 provided as follows:—"The vendors shall not, nor shall any of them, at any time hereafter as long as the company carry on business, unless with the consent of the company, carry on in the county of York or the county of Lancaster the business of banking, except so far as relates to the issue of their notes under this agreement."

Finally, article 11 is as follows:—"If at any time hereafter the vendors shall be restrained from issuing their notes, and no equal right of issue shall at the same time be given or allowed to the company, any composition or compensation which shall be made to the vendors or their successors in exercising their right to issue in respect of such right shall be paid over by them to the company: but, if at the time of such restraint an equal right of issue shall be given or allowed to the company, then any such composition or compensation as aforesaid shall belong to the vendors or their successors absolutely. If at any time hereafter the company shall acquire the right to issue their own notes, the right hereby reserved to the vendors of issuing their own notes shall thereupon cease and be determined."

Under this agreement the company took over the business

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as from the 1st of July, 1880, and have carried on the business since that time.

The facts with regard to the issue of notes of the firm were as follows:—When the business was taken over a considerable number of notes, about 60,000*l.* worth, were in circulation, and the vendors received from the company 60,000*l.* less than they would otherwise have been entitled to. In other words, 60,000*l.* in circulation were treated as a liability of the firm which the company were to meet. On the other hand, the notes in hand at the various branches of the firm were treated as so much cash lent by the firm to the company. As the outstanding notes were presented for payment they were cashed by the company; and on the other hand, they were issued by the company to persons who had to receive cash from them and who chose to take it in that form. Daily returns were made to the head office of the company, shewing how many of the firm's notes they had in stock at the closing of the bank, and this shewed how many were in circulation. Twice a year the firm were paid 2*l.* per cent. interest on the amount in circulation thus ascertained. The notes in stock were regarded as having been received by the company for the firm and relent by the firm to the company as soon as they were received by the company for the firm.

Several affidavits were filed, and a good deal of argument was put forward, as to the manner in which the books were kept, and the inferences to be drawn from them. It was sworn by certain accountants from different government offices that the books shewed that the company, and not the firm, carried on the business of a bank of issue for their own profit, and that no separate accounts were kept of the issue business and the other business of the bank. It was sworn, in substance, on behalf of the defendants that the books when properly examined shewed the course of business which has just been described; and it was argued that it followed that the firm still carried on their business of a bank of issue through the company, who acted solely as their agents. The controversy as to the books appears to us immaterial. The substance of the transaction appears on the agreement, and on statements of fact admitted to be correct. The way in which it was recorded in the books really throws no

light upon it. It is consistent with either of the views suggested to us as to the transaction itself.

The legality of the arrangement made, and of the course pursued in virtue of it, depends mainly upon the construction of 7 & 8 Vict. c. 32, ss. 11 and 12 (the Bank Charter Act of 1844). Sect. 11 prohibits the issue of notes by bankers, with the following exceptions,—"Any banker who was on the 6th of May, 1844, carrying on the business of a banker in England or Wales, and was then lawfully issuing in England or Wales his own bank notes under the authority of a licence to that effect," may "continue to issue such notes to the extent and under the conditions hereinafter mentioned, but not further or otherwise." It is admitted that the defendants (other than the Craven Bank, Limited) are within this exception. The question is whether they are within a limitation imposed upon it by s. 12. This section provides that, "if any banker who after the passing of this Act shall be entitled to issue bank notes shall .... cease to carry on the business of a banker, or shall discontinue the issue of bank notes .... it shall not be lawful for such banker at any time thereafter to issue any such notes." By the interpretation clause, s. 28, it is enacted that "the term 'banker' shall extend and apply to all corporations, societies, partnerships, and persons, and every individual person carrying on the business of bankers, whether by the issue of bank notes or otherwise, except only the governor and company of the Bank of England."

Upon these enactments it was contended that, in the circumstances already detailed, all the defendants had issued bank notes in contravention of s. 11; that the Craven Bank, Limited, having been established in 1880, were not within the exception, and that the Birkbecks were not protected by the exception in s. 11, because they had ceased to carry on the business of bankers within the meaning of s. 12.

To this it was replied that the Birkbecks had never ceased to carry on the business of bankers; that under the agreement with the company they continued to carry on the business of a bank of issue, and that the company issued their notes as their agents, and not otherwise.

We are of opinion that the contention of the Crown is correct,

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and for the following reasons:—We think that the effect of the agreement between the company and the firm of Birkbeck & Co. substantially and really was to transfer the business of the firm to the company, including in the transfer the right, which before the transfer the firm no doubt possessed, of issuing bank notes; and that the object of the provisions in the agreement which we have quoted was to evade the provisions of the Bank Charter Act, and to keep alive the power to issue notes, which according to those provisions would have ceased as soon as the firm was merged in the company. We do not mean to cast any imputation on the parties by this statement. There are many cases, and this may be one of them, in which legal obligations are the measure of moral obligations. The question before us is simply whether the parties have succeeded in keeping outside the prohibition of the Act. We think they have not.

The first question is, by whom are these notes issued? That they are in fact issued by the Craven Bank, Limited, is admitted. The contention on the part of the defendants is that they are issued by the Craven Bank, Limited, only as agents for Birkbecks. The word "issued" is not, so far as we know, defined in any of the Acts which relate to this subject; but it obviously is not equivalent to "pass" or "circulate;" for, if it were, every one who made use of these notes would violate the Act. Its meaning may be inferred from the language of several of the earlier Acts. Thus in 39 & 40 Geo. 3, c. 28, s. 15, the words used are, "it shall not be lawful for any body politic or corporate" except the Bank of England, "or for any partnership of more than six persons to borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand or at any less time than six months," &c. These words coupled with the word "issue" are repeatedly used in the later Acts: see 7 Geo. 4, c. 46, ss. 1, 3, 4; also 3 & 4 Will. 4, c. 98, s. 3; and they occur in the section on which this case turns, 7 & 8 Vict. c. 32, s. 11. The earlier part of that Act however, which separates the issue department from the banking department of the Bank of England, throws the strongest light on the subject. Shortly, the legislature provides that there shall be kept in the issue department of the bank a specified amount of securities, coin, and bullion, not to exceed,

except in certain cases, the sum of fourteen million pounds. Bank of England notes are to be delivered out of the issue department into the banking department to such an amount as, when taken with the notes then in circulation, to make up fourteen million pounds. If any banker, who in 1844 was issuing his own notes, ceases to issue them, the Bank may issue an equivalent number in addition to the fourteen millions. These provisions taken together shew clearly what is meant by the "issue" of notes. The word means the delivery of the notes to persons who are willing to receive them in exchange for value in gold, in bills, or otherwise; the person who delivers them being prepared to take them up when they are presented for payment.

Who issues the notes in question in this sense of the word? It is admitted that the Craven Bank, Limited, has the custody and actual control of the notes, and that it delivers them to persons willing to receive them in exchange for bills, cheques, cash, or other valuable security. It is also admitted that it does in fact cash notes presented for payment. In other words the Craven Bank issues the notes in fact. But it is contended that it does so as the agent of the firm of Birkbeck & Co., and not otherwise; and that therefore it does not issue them within the meaning of the Act. The principal arguments in support of this contention used before us were as follows:—First, it was said, Birkbeck & Co., and not the Craven Bank, Limited, are liable on the notes themselves as the makers of them; therefore they do not issue but merely circulate the notes. Whether the bank is liable on the notes themselves we need not decide: but, assuming for the sake of the argument that they are not, it seems to us to be a matter of no importance,—first, because the Craven Bank, Limited, are, as was admitted, under a contract with Birkbeck & Co., to cash the notes on presentment,—secondly, because when they give such notes against value received they make themselves liable to the person to whom they give them if he presents in due course to Birkbeck & Co. and they dishonour them. Hence they fall within the definition of issuing just given. They give out the notes to the public, and they are bound to the makers of the notes, and also to the persons to whom the notes are given, to give cash for them. The prohibition of s. 11 of the Bank Charter

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Act is not confined to the issue by a banker of his own notes. It forbids the "issue of any bill of exchange, or promissory-note, or engagement for the payment of money payable to bearer on demand." The Act, no doubt goes on to forbid any banker "to borrow, owe, or take up any sum of money on the bills or notes of such banker payable to bearer on demand:" but it treats the two operations as distinct, and it appears to us that the first branch of the prohibition covers what was done in this case.

It was argued that upon the construction of the agreement it must be taken that the Craven Bank, Limited, issued only as agents for Birkbeck & Co.; and the points relied on were as follows:—The agreement, it was said, keeps alive the firm of Birkbeck & Co. for the purpose of issuing their own notes. It empowers them to keep their own clerks for that purpose. It does not bind the Craven Bank, Limited, to cash the notes, or to keep a fund for the purpose of cashing them. The original fund for cashing the notes was provided by Birkbeck & Co. in the first instance, for they left in the hands of the Craven Bank, Limited, about 60,000*l.* to meet the notes in circulation when the business was taken over, which sum they would otherwise have received from the Craven Bank, Limited. The effect of the subsequent transactions is the same as if Birkbeck & Co. had had a separate room and separate clerks at the bank; as if those clerks had received cash for all notes issued, and paid cash for all notes presented, and had lent the balance in hand to the bank day by day, the bank paying 2 per cent. on the amount of notes in circulation.

It was argued on the other hand that there is no agency at all in the matter; that the 60,000*l.* left by Birkbeck & Co. in the hands of the Craven Bank, Limited, when the business was taken over, was simply a sum left to provide for one of the liabilities of Birkbeck & Co. taken over by the Craven Bank, Limited; and that in all subsequent transactions the Craven Bank, Limited, were principals, Birkbeck & Co. having nothing to do with them.

This view appears to us true. Suppose there had been but one note in circulation when the business was taken over, and that Birkbeck & Co. had received 5*l.* less than they would otherwise

have received in order to cash it. Suppose further that that note had been cashed, and that a few days after it had been re-issued as part of the consideration for an acceptance for 100*l.* discounted with the Craven Bank, Limited, by A. B., the liability of Birkbeck & Co. in respect of which they left the 5*l.* in the hands of the Craven Bank, Limited, would have been discharged as soon as five sovereigns were paid to the holder, and the transaction would have been at an end. The discounting of A. B.'s bill for 100*l.* and the re-issue of the note as part of the value given for it would have been a transaction between A. B. and the Craven Bank, Limited, to which Birkbeck & Co. would have been strangers, though they might be involved by the issue of the note in a liability to the holders, against which however the Craven Bank, Limited, had agreed to protect them.

The ingenious suppositions put forward on behalf of the defendants, as to the equivalency between what was actually done and what might have been done, appear to us to be beside the point. It is conceivably possible that the firm of Birkbeck & Co. might have continued to carry on business as a bank of issue, and might in some way have made the Craven Bank, Limited, their agents for that purpose, and this might have had much the same effect as the present arrangement; but we do not think they have succeeded in performing this delicate operation. What they would have effected by the agreement before us, if it had been lawful, would have been a transfer in a cumbrous way of the right of issuing bank-notes from Birkbeck & Co. to the Craven Bank, Limited, in consideration of a payment of 2*l.* per cent. on the amount of notes in circulation; and this transfer the law forbids. It is impossible for us to doubt that this is the object, and would, if the agreement were lawful, be the effect of the agreement.

The agreement makes over the whole business of Birkbeck & Co. to the Craven Bank, Limited, except the right to issue notes, but including such benefit of the issue as is subsequently reserved to the Craven Bank, Limited. The firm are to issue their own notes for five years, and may issue them for a longer period, "but through the officers of the company only." They may continue to use their own firm name, but only for the purposes of the issue. New partners to keep the firm alive may

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be introduced, "but not without the consent of the company." Any compensation they may receive, if their right of issue is taken away, is to be paid to the company, unless the company gets an equal right of issue, in which case the firm may retain the compensation. If the company acquires a right to issue their own notes, the right of the firm to do so is to cease. The firm is to receive from the company 2*l.* per cent. on the amount of notes from time to time in circulation. Taken together, this appears to be no more than a studiously obscure and elaborate way of saying that the firm assigns to the company the right of issuing notes, in consideration of a payment of 2*l.* per cent. on the amount in circulation. What has been done amounts to this:—the firm left in the company's hands funds to meet the notes in circulation at the time of the transfer, and since that time has allowed the company to issue the notes to its customers as principals in their transactions with such customers. The very words of the agreement shew that this is its true meaning. The firm reserve their right to issue notes, but sell to the company "such benefit of the said issue as is hereby reserved." If they had said, "we reserve the right, but sell you the benefit of the right," the case would have been plain; they would have made themselves at most bare trustees of the right for the benefit of the company: and, when the latter part of the agreement is examined, it is quite clear that that is what has actually been done. The firm of Birkbeck & Co. have deprived themselves of all possible benefit which could accrue to them from the exercise of their right, in consideration of 2*l.* per cent. on the amount of notes in circulation. For what is the benefit of the right? It was suggested to us that its benefit was that it served as an introduction to business. People who came to the bank to change notes would, it was said, come for other purposes. We cannot accept this statement. It is perfectly plain that the benefit to a banker of the right to issue notes (and it can be a benefit to no one else) is, that it operates pro tanto as an increase to his capital. So long as they are in good credit, the power to issue notes to the extent of 70,000*l.* is equivalent, for many purposes, to the Craven Bank, Limited, to the possession of 70,000*l.*, which they can employ in their business, and it is for

this that they agree to pay 2*l.* per cent. to Birkbeck & Co. What benefit is left to Birkbeck & Co. beyond the 2*l.* per cent? Absolutely nothing, except indeed the bare possibility of being allowed in a highly improbable contingency to retain a compensation to which their right is extremely questionable, to say the least. They must not issue their notes through any other bank. They must not use their firm name except for the purpose of authorizing that issue. If they get any compensation for the loss of their right, the bank is to have it, except in a highly improbable contingency. If the bank gets the right to issue its own notes, they are to discontinue their issue, obviously in order to avoid all competition. The liability of the firm to the holders of the notes remains, but that is no advantage to them but the reverse. The result is that, in consideration of the payment mentioned, the bank obtain the whole benefit of the privilege of issuing their notes and the sole power of issuing them. This, we think, is in substance and in truth a transfer of the privilege; and the effect of the Bank Charter Act is to prohibit such a transfer, as it forbids any bankers who were not carrying on the business of bankers in 1844, and then lawfully issuing their own bank-notes, to issue notes; and, if our view is correct, the issue of these notes by the Craven Bank, Limited, falls within this principle.

This is enough to entitle the Crown to judgment. But there is another point in the case which is disposed of by the same reasoning, and applies more particularly to the defendants other than the Craven Bank, Limited. Sect. 12 prohibits any banker who, being entitled to issue bank notes, "shall cease to carry on the business of a banker," from issuing thereafter such notes. The Crown contended that, on the making of the agreement of 1880, the defendants other than the Craven Bank, Limited, ceased to carry on the business of bankers, and became shareholders or directors of the Craven Bank, Limited. (1) To this

(1) Clause 14 of the agreement provided that, immediately after the registration of the company, the vendors should subscribe for and have allotted to them 12,500 shares in the nominal original capital of the company in specified proportions, such shares to be allotted and accepted at par, &c.

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it was replied that the effect of the agreement was, that they continued to carry on business as bankers of a bank of issue; and that, by the interpretation clause, the word "bankers" applied to every person "carrying on the business of banking whether by the issue of bank-notes or otherwise." It is not impossible that this expression may mean "carrying on business as a banker, whether he issues notes or not;" and it may have been thought necessary, because in several of the earlier statutes from the days of Queen Anne down to 3 & 4 Wm. 4, c. 98, the word "bank," and the expression "exclusive privilege of banking," is used to mean a bank of issue as distinguished from a bank of deposit. But, however this may be, it appears to us that the contention of the Crown is well founded.

The effect of the agreement of 1880 appears to us, for the reasons already given, to have been to transfer the business of Birkbeck & Co. to the Craven Bank, Limited, to bind Birkbeck & Co. not to carry on the business of banking, except so far as was necessary to enable them to carry out what was in reality a transfer of their right to issue notes to the Craven Bank, Limited. After the date of that agreement, it appears that the business of a bank of issue was carried on by the Craven Bank, Limited, and not by the other defendants, though the other defendants no doubt continued to authorize the issue of their notes by the Craven Bank, Limited, and to receive payment for their consent to, and participation in, such issue.

For all these reasons we think there must be,

Judgment for the Crown.

Solicitors for the Crown: *Hare & Co.*
Solicitors for defendants: *Freshfields & Williams.*

W. A.

HEAP, APPELLANT; THE RURAL SANITARY AUTHORITY OF THE BURNLEY UNION, RESPONDENTS.

1884
March 24.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 44, 276—*By-law, Validity of—Nuisance—Swine kept near Dwelling-houses.*

A rural sanitary authority, purporting to act under the powers of ss. 44 and 276 of the Public Health Act, 1875, made a by-law prohibiting the keeping of swine within the distance of fifty feet from any dwelling-house within their district:—

Held, that the by-law was unreasonable, and therefore bad.

CASE stated by justices under 20 & 21 Vict. c. 43.

The following were the material facts:—

The respondents, who are the Guardians and Rural Sanitary Authority of the Burnley Union, in the county of Lancaster, purporting to act in execution of the powers conferred by ss. 44 and 276 of the Public Health Act, 1875 (1), passed certain by-laws with respect to nuisances, which by-laws were allowed by the Local Government Board on the 14th of February, 1881.

The 11th by-law was as follows:—"The occupier of any premises shall not keep any swine, or deposit any swine's dung, within the distance of fifty feet from any dwelling-house," &c.

On the 30th of January, 1884, the appellant was served with a summons, upon the information of the respondents' inspector of nuisances, for keeping certain swine within the distance of fifty feet from his dwelling-house, "contrary to the by-laws now in force of the guardians of the Burnley Union, acting as the rural sanitary authority."

Upon the hearing of the summons at petty sessions held before certain justices of the county of Lancaster, it was admitted by

(1) By s. 44, an urban authority may make by-laws for the prevention of nuisances arising from snow, filth, dust, ashes, and rubbish, and for the prevention of the keeping of animals on any premises so as to be injurious to health.

By s. 276, the Local Government Board may, on the application of the authority of any rural district, declare, in the manner therein specified, any provisions of this Act in force in urban districts to be in force in such rural district, and may invest such authority with all or any of the powers, &c., of an urban authority under this Act.

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the appellant that the swine were kept by him within the distance of fifty feet from his dwelling-house. No evidence was offered on either side. The appellant objected that so much of the by-law upon which the summons was based was ultrà vires and bad. The justices overruled the objection, and imposed a penalty of 10*s.* and costs.

The question for the opinion of the Court was whether the decision of the justices was right.

Charles, Q.C. (*Lumley*, with him), for the appellant. Sect. 47 of the Public Health Act, 1875, provides a penalty where, in any urban district, pigs are kept in a dwelling-house, or so as to be a nuisance to any person. A by-law which specifies a distance from dwelling-houses within which pigs cannot be kept is unreasonable; and this by-law was specially unreasonable, having regard to the state of things existing in country districts. *Wanstead Local Board of Health* v. *Wooster* (1) does not apply, the by-law in that case being made with respect to an urban sanitary district.

Arthur Collins, Q.C., for the respondents. A by-law fixing an arbitrary distance is not per se unreasonable: *Wanstead Local Board of Health* v. *Wooster*. (1) In that case Blackburn, J., thought that 100 feet was not an unreasonable distance. The by-law in question here has been made by the rural authority with reference to the condition of their district, and the Court ought not to interfere with the exercise of their powers, which has been sanctioned by the Local Government Board.

LORD COLERIDGE, C.J. I am of opinion that the by-law is bad because unreasonable. It is impossible to attempt to lay down what, under all the circumstances, would be a reasonable by-law, but it seems to me unreasonable to say that in country districts, in the present state of things, nobody shall keep a pig within fifty feet of his dwelling-house. One cannot exclude from the mind the common knowledge that in thousands of cases pigs are kept within that distance. I am not pressed with the case of *Wanstead Local Board* v. *Wooster*. (1) I observe that Blackburn, J., in his judgment enforces the distinction between

(1) 38 J. P. 21.

a populous place and a rural district like that in question here. It is true that he said that twice the distance specified by this by-law was not unreasonable in a by-law made under 21 & 22 Vict. c. 98, s. 32, with respect to a populous place, but he by no means said that half that distance in the country would be reasonable. No evidence was given, or admission made, before the justices, except the admission that the pigs were in fact kept within fifty feet of the appellant's house. I cannot see that that would in itself necessarily be a nuisance or injurious to health. I am of opinion that the order of the justices was wrong, and that the conviction should be quashed.

STEPHEN, J. I am of the same opinion. I think the distance of fifty feet, within which the by-law provides that pigs cannot be kept, is too wide. The local authority probably founded the by-law upon the decision of the Queen's Bench in *Wanstead Local Board* v. *Wooster* (1), but I cannot think the by-law in the present case was a reasonable one to make under the circumstances.

Conviction quashed.

Solicitors for appellant: *Bolton, Robbins, Busk & Co., for Creeke & Sandy, Burnley.*

Solicitors for respondents: *Shaw & Tremellen, for Artindale & Artindale, Burnley.*

(1) 38 J. P. 21.

W. A.

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March 24.

GARRETT AND OTHERS, APPELLANTS; THE LICENSING JUSTICES OF THE DIVISION OF ST. MARYLEBONE, MIDDLESEX, RESPONDENTS.

Licensing Acts—Inn—Licence—Justices—Renewal of Licence—Mortgagor and Mortgagee—Appeal—Quarter Sessions—Licensing Acts—9 Geo. 4, c. 61, s. 27—32 & 33 Vict. c. 27, s. 19.

The tenant and occupier of a house, licensed for the sale of beer on the premises, in 1876 assigned all his interest in the premises for the residue of his term of years, and the benefit of the licence, to the appellants by way of first mortgage to secure the repayment of moneys advanced by them; and by the mortgage deed irrevocably constituted the appellants his attorneys, in his name, and as his act and deed, to do all acts necessary to procure a transfer of the licence. In 1883, the moneys secured by the mortgage being still unpaid, the occupier sent a written application for a renewal of his licence to the justices at their annual licensing meeting, and they adjourned the hearing of the application. At the adjourned hearing the appellants applied, as mortgagees and under their power of attorney, for a renewal of the licence to the occupier, who appeared, but stated that he did not wish for a renewal. No objection was made to the renewal on any of the grounds specified in 32 & 33 Vict. c. 27, which Act applied to the occupier's licence. The justices refused the application, and the appellants appealed to quarter sessions in their own names as mortgagees, and also as attorneys of the occupier, and in his name, and for and on his behalf. At the hearing the occupier again appeared, and stated that he did not wish the licence to be renewed, and the quarter sessions thereupon affirmed the order of the licensing justices:—

Held, first, that the appellants were persons aggrieved, within 9 Geo. 4, c. 61, s. 27, by the refusal of the licensing justices to renew the occupier's licence; and were therefore entitled to appeal to quarter sessions: secondly, that upon the facts stated the licensing justices and the court of quarter sessions were bound to grant the application of the appellants for a renewal of the licence to the occupier.

UPON the hearing of two appeals to the Middlesex Quarter Sessions against an order made by the licensing justices of the division of St. Marylebone, refusing to renew a wine and beer licence, the justices at quarter sessions dismissed the appeal subject to a case stated for the opinion of the Queen's Bench Division. The following are the material facts:—

J. Swannell, previous to July, 1876, was, and has ever since been, tenant of a wine and beerhouse, 2, Oxford Street. The house was licensed, and the licence was in force, for the sale of beer on and off the premises before and on the 1st of May, 1869, the date referred to in 32 & 33 Vict. c. 27, s. 19, which enacts,

with respect to houses licensed at that date, that it shall not be lawful for justices to refuse applications for certificates for the sale of beer, wine, &c., to be consumed on the premises except upon one of the four grounds specified in s. 8 of the Act. This licence was duly renewed from year to year, and the house remained duly licensed up to the 5th of April, 1883. A wine licence was granted in 1871, and was duly renewed after that date in the same way as the beer licence.

By indenture dated the 18th of July, 1876, Swannell assigned to the appellants, Garrett, Whitaker, & Grimwood (who were brewers trading as Garrett & Co.), his lease of, and all his interest in, the premises, 2, Oxford Street, together with the benefit of the magistrates' and excise licences, for the residue of his term of fifty-six years by way of a first mortgage on the premises. The mortgage deed contained a covenant by Swannell, if default should be made in payment of the moneys thereby secured, thereupon, or at any time thereafter upon demand, to assign the licences, and to do all other acts necessary for effectually vesting the same in the mortgagees, and also a power for the mortgagees at any time after such default, if they should think fit, without the concurrence of the mortgagor, absolutely to sell and dispose of the mortgaged premises, with possession, and the benefit of the excise and other licences. The appellants by the same indenture were irrevocably appointed the true and lawful attorneys of Swannell, in his name, and as his act and deed, to sign, seal and deliver all such documents, and to give all such notices and consents, and to do all such acts as the mortgagees might consider necessary to withdraw and change the entries in the books of the excise, and to procure the transfer of the licences relating to the premises, or to the mortgagees in respect of the said premises.

In November, 1882, sums amounting to over 2000*l.* being due from Swannell to the appellants under the mortgage deed of the 18th of July, 1876, and a subsequent deed of further charge, the appellants gave notice to Swannell to pay off those sums, and upon his failure so to do they put a man into possession of the premises to protect their interests; but during the time he remained in possession he in no way interfered with the business,

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or with Swannell, who still remained the resident holder and occupier, and kept the licensed house open to the public.

Prior to the 5th of March, 1883, the day upon which the respondents held their annual licensing meeting, Swannell sent to the respondents' clerk, in accordance with the usual practice, a written application for a renewal of his licence. Swannell did not, nor did anyone on his behalf, attend the licensing meeting. No special notice of objection had been served upon him seven days before the commencement of the annual licensing meeting.

On the 5th of March, 1883, the justices adjourned the consideration of Swannell's application for a renewal of his licence until the 12th of March—the general adjournment day. This was done partly in accordance with the practice of the licensing sessions when no one appears to apply for a renewal of a licence, and partly because the rate collector of the district stated to the justices that he intended to object to the renewal of the licence on the grounds that Swannell was not bonâ fide in the actual possession of the premises, and that the business was not being properly carried on by him.

On the 5th of March the clerk to the respondents, by their direction, duly gave notice to Swannell that his application had been adjourned to the 12th of March, and that an objection would then be made on the grounds alleged to exist by the rate collector.

On the 10th of March the man who had been placed in possession of the house by the appellants left the house on some business of his own, and Swannell refused to re-admit him.

On the 12th of March, Swannell attended at the adjourned meeting held by the respondents, and was represented by counsel. The appellants also appeared by counsel, and applied for a renewal of the licence to Swannell. Save two statements on oath by Swannell that he was in occupation of the licensed premises, and that he had carried on the business up to the 10th of March without complaint, the justices did not hear any evidence on oath. After some controversy between the counsel as to the renewal of the licence, Swannell's counsel stated that, rather than the appellants should have any hold over the licence, Swannell would prefer that the renewal should be refused. The rate collector appeared in support of the notice of objection to the renewal.

The respondents refused to renew the licence, giving no reasons.

The appellants gave two notices of intention to appeal to quarter sessions against this refusal.

In the first appeal, Garrett, Whitaker, & Grimwood, were the appellants, and in the notice they were described as "the first mortgagees of the said premises in whom the legal estate of such premises is vested by virtue of a certain indenture of mortgage executed by the said J. Swannell." In the second appeal Swannell's name was added as an appellant to the names of Garrett, Whitaker, & Grimwood, and the appellants were described as the first mortgagees under the indenture of mortgage executed by Swannell, "on behalf of the said J. Swannell, and as his duly appointed attorneys under the powers vested in us by the said indenture." In both notices it was stated that the appellants felt aggrieved by the refusal of the licensing justices to renew the licence.

In addition to giving these notices the appellants entered into recognizances in their own names, and in the one case also as the attorneys of Swannell, to prosecute the appeals, and pay such costs as the Court should award. Swannell personally did not enter into any recognizance.

On the appeals being heard at quarter sessions, Swannell's counsel stated that Swannell was no party to the appeals; that he did not apply for the licence, and that he objected to its being granted by way of renewal to him or anyone else. Swannell was subsequently called, and gave evidence on oath that he was in actual possession of and resident on the premises; that he had carried on the business up to the 10th of March without complaint; that he had been in occupation of the premises since that date; that he had been prevented from properly carrying on the business by the mortgagees; and that he did not wish to have the licence renewed. No evidence varying or contradicting Swannell's evidence was given.

The respondents' counsel contended that the appellants were not persons "aggrieved" within 9 Geo. 4, c. 61, s. 27, that Swannell, being the holder of the licence, the renewal of which had been refused, was the only person who could appeal, or to whom, on appeal, the Court could renew the licence, and that, as Swannell

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did not apply for a renewal and objected to have the licence granted to him, the appeal should be dismissed.

The appellants' counsel contended that the appellants were persons "aggrieved," within the meaning of the statute, by the refusal of the licence, both in their character as first mortgagees, and in their character as attorneys of Swannell empowered by him by deed to act in his behalf; further, that as there was no lawful objection to the renewal of the licence, there could be no lawful opposition, and the licence ought to have been renewed on the 5th of March, 1883, without requiring Swannell's attendance; and that at all events the renewal could not be refused by the court of quarter sessions, except on one of the four grounds mentioned in s. 8 of 32 & 33 Vict. c. 27.

The court of quarter sessions were of opinion that they could not legally grant the licence by way of renewal to Swannell, or any one else, and that they were not, under the circumstances, bound by law to allow the appeals, or to grant the licence.

The questions for the opinion of the Court were:—

(a.) Whether the appellants, Garrett & Co., were persons aggrieved by the refusal to grant the licence by way of renewal to Swannell?

(b.) Whether the appellants, in their capacity of mortgagees under the facts stated, had a right to appeal in the name of Swannell without his concurrence?

(c.) Whether in law the court of quarter sessions were bound to allow the appeals, or either of them, and to grant the licence by way of renewal?

If the Court should be of opinion that the decision of the court of quarter sessions was right the orders of sessions were to be affirmed. If the Court should be of opinion that the orders of sessions were erroneous, those orders were to be quashed, and the licence to be granted.

Finlay, Q.C. (*Tickell,* with him), for the appellants. By 9 Geo. 4, c. 61, s. 27, "any person who shall think himself aggrieved" by any act done by justices under the statute may appeal to the next quarter sessions. The appellants were persons "aggrieved" within the meaning of that section; their security

would be greatly diminished in value by reason of the justices' refusal to renew the licence. *Rex* v. *Justices of Middlesex* (1) is a decision that persons must be "immediately aggrieved," in order to have a right of appeal under the section. The only grievance in that case was that the new house, in respect of which the justices had granted a licence, would be a rival to the appellants' house. In the present case the appellants are immediately aggrieved by the injury to their security.

Next, the justices ought to have given effect to the power of attorney contained in the mortgage deed. Swannell, the occupier of the house, was before the Court; no objection to the renewal of the licence was made on any of the grounds specified by 32 & 33 Vict. c. 27, s. 8; Swannell had irrevocably constituted the appellants his attorneys to apply for, and do all acts necessary to obtain, a renewal; and the justices, both at the licensing and quarter sessions, were therefore bound to grant a renewal of the licence.

Mead, for the respondents. The appellants were not persons "aggrieved" within the meaning of 9 Geo. 4, c. 61. Their grievance is not immediate, but arises through having made a contract with the holder of the licence. *Rex* v. *Justices of Middlesex* (1) is therefore in point. The appellants could not, because they were Swannell's mortgagees, appeal as his agents, nor could they properly enter into recognizances for him. Admitting that, if Swannell's application for a renewal had been continued, the justices could only have refused to grant it upon one of the grounds referred to in 32 & 33 Vict. c. 27, s. 19, still it is contended that the grant of a licence is merely personal, and when Swannell stated that he did not wish for a renewal there was nobody before the Court to whom it could have been granted. He could not be compelled to remain the holder of a licence against his will, and as such subject to the liabilities imposed by statute upon the occupier of a licensed house. Prior to 1872 justices had no power to grant a licence upon the application of a person who did not himself attend the licensing sessions, except in cases under s. 12 of 9 Geo. 4, c. 61, where he was prevented from attending through sickness; but, if the contention for the appellants prevails, the justices ought to grant the application where

(1) 3 B. & Ad. 938.

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the applicant does attend, but states that he does not want the licence. Attendance is now dispensed with by the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 42, sub-s. 2, in ordinary cases where there is no notice of opposition. Here there was notice of opposition by the rate collector, and though no evidence on oath in support of his objection was given as required by sub-s. 3 of s. 42, Swannell attended the adjourned meeting and withdrew his application. He thus "neglected to apply" for a licence within s. 14 of 9 Geo. 4. c. 61, and the appellants' remedy was to apply under that section for a grant of the licence as new tenants and occupiers of the house: *Reg.* v. *Justices of Liverpool.* (1) They had also a remedy by action in the Chancery Division, to enforce performance by Swannell of the stipulations contained in the mortgage deed.

LORD COLERIDGE, C.J. I am of opinion that the questions asked in the case should be answered in favour of the appellants. The first question is, whether or not the mortgagees under the deed of the 18th of July, 1876, were entitled to appeal as persons aggrieved, within s. 27 of 9 Geo. 4, c. 61, by the refusal of the licensing justices to renew the licence to Swannell. I am clearly of opinion that they were. They had advanced large sums of money on mortgage to Swannell, and the value of the mortgaged premises was likely to be, and in fact would be, greatly affected by the circumstance of a renewal of the licence being granted or refused. Their interest in the premises was really greater than Swannell's, and should the licence be improperly withheld, they would be undoubtedly aggrieved. The next question is, whether or not the appellants upon the facts had a right, as Swannell's mortgagees, to appeal in his name without his concurrence. The facts are of a character somewhat unusual. The appellants had become, under their mortgage deed, the immediate landlords of Swannell, having the remainder of the term for which he was tenant vested in themselves. He was in substance carrying on the business as their agent, and the case finds that they had been irrevocably constituted by him his attorneys to act in his name with respect to the licence. They were clothed by deed under seal with full authority to use his name, and do all such acts with

(1) 11 Q. B. D. 638.

respect to the licence as he might have done. Swannell did not, as he need not under the recent Act, attend the first meeting of the licensing justices when the renewal of a licence ought to take place. Ordinarily, there being no opposition, a renewal would have been granted without dispute, but it seems to be the practice of these sessions, where the applicant does not attend on the first day, to adjourn the hearing of the application. Between the first licensing day and the day of adjournment formal notice that there would be opposition was served on Swannell. At the adjourned meeting both Swannell and the mortgagees appeared by counsel. Swannell appears to have been annoyed at the control the mortgagees were exercising over the business, and in the course of the hearing after some discussion, he said through his counsel that rather than that they should have a control over the licence he would prefer that it should not be renewed. The licensing justices thereupon treated his application for a renewal as withdrawn, and refused to grant the renewal to him upon the application of the mortgagees. On the hearing of the appeal Swannell again was represented by counsel, who stated that Swannell was no party to the appeal, and did not wish to have the licence renewed. Whether the justices were right after that statement in hearing Swannell's evidence I give no opinion. But they had before them the appeal of the mortgagees in their own name as persons aggrieved, and as the attorneys of Swannell claiming a renewal of the licence as and for him. It was not argued that, as between Swannell and the mortgagees, the power of attorney was revocable, or that it was not a power by virtue of which the mortgagees could do such acts as they thought necessary and expedient for getting the licence continued—as by appealing to the quarter sessions and applying for a renewal in Swannell's name to protect their own interest. It appears to me that these facts ought to have concluded the matter so far as the justices were concerned; that they could not inquire into any questions in dispute between Swannell and the mortgagees; and that having Swannell before them and an application made by the mortgagees for him and on his behalf under the power of attorney for a renewal of the licence, the justices were bound to grant the application unless objection were made upon one of the four

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grounds specified in the Act. The mistake made by the justices was in not giving due effect to the power of attorney. I agree that they could not grant a renewal if there was no applicant before them, but Swannell being in Court, they ought to have treated the application as made for him and on his behalf, and in the absence of any of the four grounds of objection mentioned in the Act they ought to have granted a renewal of the licence to him. The question is by no means clear or easy of solution, but upon the best judgment I can form I have come to the conclusion that the decision of the justices was erroneous in law, and that their order should be quashed.

STEPHEN, J. I am of the same opinion. I think it is clear that the mortgagees were persons aggrieved within the meaning of the Act of Parliament. *Rex* v. *Justices of Middlesex* (1) is not in conflict with this view. The mortgagees in the present case were persons immediately aggrieved by the refusal to grant a renewal of the licence, because their pecuniary interest in the premises was immediately affected. They therefore had a right to appeal. In prosecuting the appeal they were acting under the power of attorney contained in their mortgage deed, and their title as Swannell's attorneys was clearly made out before the justices. I can quite understand the difficulty the justices felt in the matter. It would not be obvious to them by any means that a licence ought to be granted to a person who stated that he did not wish to have it; but it appears to me that, as soon as the mortgagees made out a clear title to appear for Swannell under the power of attorney, the justices were bound to grant the licence to him. I agree generally with the reasons given by my Lord, and I am of opinion that the questions asked in the case should be answered in the way he has stated.

Judgment for the appellants, quashing the orders of sessions.

Solicitors for appellants: *Routh, Stacey, & Castle.*
Solicitors for respondent: *Clarkson, Greenwell, & Wyles.*

(1) 3 B. & Ad. 938.

W. A.

THE MIDLAND RAILWAY COMPANY, APPELLANTS; FREEMAN, RESPONDENT. 1884 *March* 31.

Contagious Diseases (Animals) Act, 1878 (41 & 42 *Vict. c.* 74)—*Justices—Jurisdiction—Offences against Act—Carriers—Persons "causing or permitting" Movement of Animals into Proscribed Districts.*

By an Order of Council made under the Contagious Diseases (Animals) Act, 1878, if an animal is moved in contravention of the regulations of any local authority, the person "causing, directing, or permitting" the movement shall be deemed guilty of an offence against the Act. The local authority of the county of Dorset having by regulations prohibited the movement of animals into their district except under specified conditions, animals were consigned to a place within the district, with through bills from Cork viâ Bristol and a specified route. The appellants were no parties to the contract with the consignor, but in furtherance of the scheme of carriage carried the animals on their railway over a portion of the route to a point outside the county of Dorset, whence they were subsequently carried into that county by another company:—

Held, that the appellants were liable to be convicted of an offence against the act as persons "causing, directing, or permitting" the movement of the animals within the meaning of the Order of Council; and that the justices of the county of Dorset had jurisdiction to convict.

CASE stated by justices under 42 & 43 Vict. c. 49, s. 33.

At petty sessions held at Shaftesbury the respondent, a superintendent of police, preferred an information against the appellants under s. 61 of the Contagious Diseases (Animals) Act, 1878, charging that they, on the 16th of December, 1883, at the parish of Gillingham, in the county of Dorset, did unlawfully cause to be moved into the district of the local authority for the county, under the Contagious Diseases (Animals) Act, 1878, certain animals—to wit, 100 pigs—such animals not being accompanied by the declaration required by the regulations of the said authority, contrary to the form of the statute. (1)

(1) By s. 32 of the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), the Privy Council may from time to time make such general or special orders as they think fit (xvii) for prohibiting or regulating movement of animals, &c.; and by s. 58 (2) every Order of Council shall have effect as if it had been enacted by this Act.

By s. 61 (1) if any person, without lawful authority or excuse, proof whereof shall lie on him, does any of the following things, he shall be guilty of an offence against this Act:

(i) If he does anything in contravention of this Act, or of an Order of

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The justices convicted the appellants, and imposed penalties amounting to 50*l.* and costs.

On the 15th of September, 1883, the local authority of the county of Dorset issued regulations, which came into force on the 22nd of September, and by which animals were prohibited from being moved into the district of the local authority of the county of Dorset from any other district (with certain specified exceptions as to places not in question in this case) unless previously to such animal being moved the owner, or his authorized agent, signed a declaration stating certain prescribed facts with respect to the animal, and such declaration should be equivalent to a licence to move such animal, but should be available for six days only after the date of the declaration, and accompany the animal whilst being moved, and be delivered up to the person to whose land or premises the animal was moved, &c. The regulations were expressed not to prohibit the movement of animals through the district by railway without untrucking.

The pigs in question were sent in two consignments. About the 14th of December, 1883, fifty of the pigs were delivered at Cork to the City of Cork Steam Packet Company, Limited, to be carried at through rates and with through bills from Cork to Gillingham, in Dorsetshire, "viâ Bristol and the London and South Western Railway." No contract with respect to the pigs was made by the consignor with the Midland Railway Company.

Council, or of a regulation of a local authority.

Penalties for offences against the Act are provided by s. 60.

An Order of Council made on the 24th of August, 1883, provides, by clause 3, that any local authority may make, from time to time, regulations for prohibiting or regulating the movement by land or water of animals into their district from other districts in England, Wales, Scotland, or Ireland; but (b. ii) any regulation made under the order shall not restrict movement of animals by railway through the district of the local authority; and by clause 4: "If an animal is moved in contravention of this order, or of a regulation of a local authority thereunder, the owner of the animal, and the person for the time being in charge thereof, and the person causing, directing, or permitting the movement, and the person or company moving or conveying the animal, and the owner and the charterer and the master of the vessel in which it is moved, and the consignee or other person receiving or keeping it knowing it to have been moved in contravention as aforesaid, shall each, according to and in respect of his or their own acts and defaults, be deemed guilty of an offence against the Act of 1878."

At Bristol they were put into trucks belonging to that company, and were conveyed in the same trucks on their line from Bristol to Bath; thence over the Somerset and Dorset line (which is worked jointly by the Midland Railway Company and the London and South Western Railway Company under a lease for ninety-nine years) to Templecombe, in Somersetshire, and from Templecombe to Gillingham over the line of the London and South Western Railway Company. The trucks containing the pigs entered the district of the local authority for the county of Dorset at some point between Templecombe and Gillingham. The other consignment was from Waterford to Gillingham, and the facts raised the same question. No declaration, as required by the regulations of the local authority, accompanied the pigs.

The questions for the opinion of the Court were (so far as they are material for the purposes of this report):—

Whether there was any evidence that the appellants had been guilty of the offence with which they were charged, and whether the justices exceeded their jurisdiction, or acted without jurisdiction, in convicting the appellants.

W. J. Noble, for the appellants. The words "person causing, directing, or permitting the movement," in the Order of Council are intended to apply to persons who are parties to the contract of carriage. There was no contract between the consignor and the appellants; and they did not themselves carry the pigs into the county of Dorset. It cannot have been intended to strike at companies merely conveying animals over a portion of a route which ends in a prohibited district. The appellants were entitled to expect that the London and South Western Railway Company, who had sole control of the pigs when they entered the county of Dorset, would refuse to carry them beyond Templecombe unless a declaration was forthcoming. No offence was committed until the pigs were untrucked, and the appellants had, and could have, no part in untrucking them. If the appellants are within the meaning of the Order of Council, the justices had no jurisdiction to deal with this offence, which was committed outside the county of Dorset.

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Pitt-Lewis, for the respondent. The appellants received the pigs into their trucks at Bristol to be forwarded without untrucking to Gillingham. They were therefore acting in furtherance of the scheme of carriage by which the pigs were to be got into the county of Dorset to be there untrucked, and the appellants are within the words of the Order of Council persons "causing or permitting" the movement. The justices of the county of Dorset had jurisdiction for the purposes of this offence, which was a continuing one until the animals were untrucked at Gillingham: *Muir* v. *Hore* (1); but, if not, s. 46, sub-s. 2, of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), applies to give them jurisdiction by providing that, where an offence is begun within the jurisdiction of one court and completed within the jurisdiction of another court of summary jurisdiction, any one of such courts may convict.

DAY, J. I think this conviction should be affirmed. I entertain no doubt whatever with reference to the point of law raised. There was evidence for the justices that the appellants were concerned in the carriage of these pigs with full knowledge that they were to be sent from Bristol to Gillingham, and there delivered to the consignee. They undertook the carriage for reward, and in furtherance of their undertaking they handed the pigs over to the London and South Western Railway Company. It is unnecessary to determine whether or not the appellants undertook the whole carriage. It is sufficient that they undertook the carriage between Bristol and Bath at any rate, knowing that the pigs were going to Gillingham, and delivering them to the joint committee to be carried over the Somerset and Dorset line; and handed over to the London and South Western Railway Company at Templecombe, to be thence carried on to Gillingham, in the county of Dorset. I am of opinion, therefore, that the appellants clearly come within the words of the Order of Council "the person causing or permitting the movement." On the question of jurisdiction also I think it is perfectly clear that the justices have jurisdiction over persons who do the prohibited

(1) 47 L. J. (M.C.) 17.

things outside the limits of the justices' ordinary jurisdiction. The offence is moving or causing to be moved into the jurisdiction, and I am of opinion that it includes acts done outside the jurisdiction in furtherance of the scheme to get the animals into a district into which it was unlawful to move them.

SMITH, J. I am also of opinion that this conviction should be upheld. The question is whether the appellants "caused, directed, or permitted" these pigs to be moved into a proscribed district without a proper pass. The terms of the Order of Council are as wide as possible. They were no doubt made so advisedly in order to prevent, when disease is rife, the movement of any animals whatever unless accompanied by the proper declaration. It is impossible, I think, to hold otherwise than that the appellants come within the purview of the Order of Council as persons "causing, directing, or permitting" the removal.

As to the contention that the justices acted without jurisdiction, because, if the appellants did cause, direct, or permit the removal, it was done outside the jurisdiction, I think that s. 46, sub-s. 2, of the Summary Jurisdiction Act, 1879, covers this case.

Conviction affirmed.

Solicitors for appellants: *Beale, Marigold, Beale, & Groves.*
Solicitors for respondent: *Warry, Robins, Burges, & Co.*

W. A.

END OF VOL. XII.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1884, will be as follows:—

In the First Series,
25 Ch. D.

In the Second Series,
12 Q. B. D. 9 P. D.

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2. —— *or Chose in Action—Present or Future Balance at Bank—Notice of Assignment after Assignor's Death—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.] By a deed of assignment all moneys then or thereafter to be standing to the credit of the assignor at a bank were assigned to a trustee, on trust for the assignor for his life, and after his death on other trusts. At the date of the assignment the assignor's balance at the bank was 48*l.*, at his death it was 217*l.* Notice of the assignment was not given to the bank until after the assignor's death. In an action by the trustee against the bank to recover the balance of 217*l.*:—*Held*, that the bank, being a stranger to the assignment, could not set up the defence that it was voluntary and therefore invalid in equity; that the balance at the time of the assignor's death was a debt or legal chose in action within the meaning of s. 25, sub-s. 6 of the Judicature Act, 1873; that notice after the death of the assignor was sufficient; and that the plaintiff was entitled to recover. Walker *v.* Bradford Old Bank - - - - - 511

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BANKER—*Bank Notes, Issue of—Penalties—The Bank Charter Act*, 1844 (7 & 8 *Vict. c.* 32), *ss.* 11, 12.] By s. 11 of the Bank Charter Act, 1844, it shall not be lawful for any banker to "issue" any note payable on demand, except that any banker carrying on business as such on the 6th of May, 1844, and then lawfully issuing his own notes, may continue to issue them under specified conditions; and, by s. 12, if any banker, entitled after the passing of the Act to issue bank notes, "shall cease to carry on the business of a banker," it shall not be lawful for him to issue such notes at any time thereafter. In 1880 a firm of bankers, entitled to issue their own notes under the exception in s. 11, sold their business to a limited liability company upon the following terms:—The company took over the whole of the business as a going concern, and the goodwill, except and reserving to the firm the right to issue their own notes, but including in the sale and purchase such benefit of the issue as was thereby agreed to be given to the company; the firm were to issue their notes in the same form as theretofore, but through the company's officers only, and might nominate those officers and make the returns required by statute through them: the company were to allow and pay the firm 2*l.* per cent. interest on the amount of all notes from time to time in circulation: for the purposes of the issue only the firm might continue to use their accustomed name, but they were not to assign their rights, nor to take new partners for the purpose of continuing the issue without the consent of the company, nor to carry on the business of banking within a defined district without the like consent, except so far as related to the issue of their notes under the agreement: if the right of issue should at any time be taken away from the firm they were to pay any compensation they might receive to the company, unless the company should get an equal right of issue, in which case the firm might retain the compensation: if the company acquired a right to issue their own notes, the firm's right of issue was to cease. When the business was taken over by the company, a large number of the firm's notes being in circulation, the amount of them was deducted from the purchase-money, and the notes when presented for payment, were cashed by the company, and reissued by them. Notes in hand when the business was taken over were treated as cash lent by the firm to the company. Daily returns were made by the company shewing the number of the firm's notes in circulation, and twice a year the company paid 2*l.* per cent. interest to the firm on the amount so ascertained. On an information against the firm and the company for penalties in respect of their having issued the notes contrary to the provisions of the Act;—*Held*, that the company had "issued" the notes within the meaning of s. 11 of the Bank Charter Act, 1844; that the firm, in issuing the notes, were not protected by the exception in s. 11, because after the making of the agreement they had "ceased to carry on the business of bankers" within the meaning of s. 12; and therefore that all the defendants were liable. Attorney General *v.* Birkbeck 605

BANKRUPTCY—*Receiving Order—Act of Bankruptcy committed before the 1st of January*, 1884—*Pending Liquidation Proceedings—Proof of Act of Bankruptcy—Appearance of Debtor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, 5, 7, 169—*Bankruptcy Rules*, 1883, *rr.* 139, 262, 263, 264.] A receiving order can be made on a bankruptcy petition presented under the Bankruptcy Act, 1883, founded on an act of bankruptcy committed before that Act came into operation, but in respect of which no bankruptcy proceedings had been taken before that date. And the fact that liquidation proceedings under the Bankruptcy Act, 1869, were pending when the Act of 1883 came into operation, and that those proceedings afterwards came to an end by reason of the creditors failing to pass any resolution, does not affect the power of the Court to make the receiving order. —If, on the hearing of a bankruptcy petition, the act of bankruptcy alleged is not strictly proved, but the debtor appears and does not raise the objection, and a receiving order is made, he cannot on an appeal from that order raise the objection. Ex parte Pratt - - - C. A. 334

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2. —— *Adjudication of Bankruptcy — Jurisdiction—Act of Bankruptcy committed before Commencement of Bankruptcy Act*, 1883—*Liquidation Proceedings under Bankruptcy Act*, 1869—*Failure of Proceedings after 1st of January*, 1884—*Rehearing — Bankruptcy Act*, 1863 (46 & 47 *Vict. c.* 52), *ss.* 4, 9, 94, 104, 169—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-s.* 12.] A debtor filed a liquidation petition in December, 1883, and a receiver of his property was appointed. On the 15th of January, 1884, the adjourned first meeting of the creditors was held, when the creditors separated without passing any resolutions, and without again adjourning the meeting. On the 21st of January one of the creditors presented a bankruptcy petition against the debtor under the Act of 1869, alleging the filing of the liquidation petition as an act of bankruptcy. On the 1st of February, the registrar adjudicated the debtor bankrupt on the petition. The debtor was present, and raised no objection to the jurisdiction of the Court to make the order. The receiver had not been discharged. On the 14th of March (*Ex parte Pratt*, ante, 334, having meanwhile been decided), the debtor applied to the registrar for a rehearing of the petition, and a reversal of the order of adjudication, on the ground that there was no jurisdiction to make it. The registrar refused the application:—*Held*, that the Court had no jurisdiction to make the adjudication under the Act of 1869 on the ground that an act of bankruptcy had been committed, but that it would have had jurisdiction to make it under the power given by sub-s. 12 of s. 125 of that Act.—*Held*, therefore, that, as the objection had not been raised before the registrar, a rehearing ought not to be allowed.—Observations as to the exercise of the power to allow a rehearing. Ex PARTE MAY - - - - C. A. 497

3. —— *Bankruptcy Notice—Bankruptcy Petition—Receiving Order—Conditional Payment of Debt within Seven Days after Service of Notice—Promissory Note—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).] Within seven days after the service of a bankruptcy notice the debtor gave to the creditor a promissory note, payable two months after date, for the amount of the debt, which note the creditor accepted:—*Held*, that, the note being a conditional payment of the debt, the creditor could not, during the currency of the note, avail himself of the bankruptcy notice to obtain a receiving order against the debtor. Ex PARTE MATTHEW - - - C. A. 506

4. —— *Bankruptcy Notice—Receiving Order—"Final Judgment"—Order for Payment of Costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).] The defendants to an action for the specific performance of a contract executed the deeds necessary to carry out the contract, and an order was then made by consent that, on the defendants paying the plaintiff's taxed costs of the action all further proceedings in the action should be stayed. The costs were taxed, and an order was made that the defendants should, on or before a day named, pay the taxed amount. Payment was not made within the time appointed:—*Held*, that the order for payment was not a "final judgment," within the meaning of sub-s. 1 (g) of s. 4 of

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5. —— *Bankruptcy Notice — "Final Judgment"—Garnishee Order absolute—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).] A garnishee order absolute is not a "final judgment" against the garnishee within sub-sect. 1 (g) of sect. 4 of the Bankruptcy Act, 1883, and the judgment-creditor who has obtained the order cannot issue a bankruptcy notice against the garnishee in respect of it. Ex PARTE CHINERY [C. A. 342

6. —— *Debtor and Creditor—Execution—Sale by Sheriff—Application ex parte to sell Goods by Private Contract—Discretion—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52) *s.* 145.] Under s. 145 of the Bankruptcy Act, 1883, the Court has a discretion to order goods taken in execution by the sheriff to be sold by private contract instead of by public auction, notwithstanding that the application for leave to sell by private contract is made by the execution creditor ex parte, and in the absence of all the other creditors of the execution debtor. HUNT *v.* FENSHAW - - 162

7. —— *Judgment Creditor—Writ of Elegit—Seizure but not delivery of the Goods—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 146, 169.] By the Bankruptcy Act, 1883, s. 146, "the sheriff shall not under a writ of elegit deliver the goods of a debtor, nor shall a writ of elegit extend to goods," and by s. 169, which repeals amongst other enactments so much of 13 Edw. 1, c. 18, as relates to the chattels of the debtor save only his oxen and beasts of the plough, it is enacted that "the repeal effected by this Act shall not affect any thing done before the commencement of this Act under any enactment repealed by this Act, nor any right or privilege acquired or duty imposed, or liability or disqualification incurred under any enactment so repealed." Some days before the 1st of January, 1884, when the Bankruptcy Act of 1883 came into operation, the sheriff entered into possession and seized goods of the defendant, under a writ of elegit issued under statute 13 Edw. 1, c. 18, at the suit of the plaintiff, a judgment creditor of the defendant, but no delivery of such goods had been made to the plaintiff before the 1st of January, 1884:—*Held*, reversing the decision of the Queen's Bench Division, that the Bankruptcy Act, 1883, had not deprived the plaintiff of his right to the delivery of such goods. HOUGH *v.* WINDUS - - - C. A. 224

8. —— *Lunatic—Bankrupt—Leave to Committee to file Declaration of Insolvency—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4 (*f*), 148.] Where it appears to be for the benefit of a lunatic that he should be made bankrupt, the Court will give leave to the committee in the name of the lunatic to file a declaration of insolvency, or to present a bankruptcy petition under the Bankruptcy Act, 1883, s. 4 (f). IN RE JAMES - C. A. 332

BASTARDY—*Service of Summons in Scotland—Jurisdiction of Justices—Bastardy Act*, 1872 (35 & 36 *Vict. c.* 65)—*Summary Jurisdiction Acts* (42 & 43 *Vict. c.* 49, *and* 44 & 45 *Vict. c.* 24).] By 44 & 45 Vict. c. 24, s. 6, "A court of summary juris-

BASTARDY—*continued.*
diction in England and a sheriff court in Scotland shall respectively have jurisdiction by order or decree to adjudge a person within the jurisdiction of the court to pay for the maintenance and education of a bastard child of which he is the putative father," "notwithstanding that such person ordinarily resides or the child has been born, or the mother of it ordinarily resides, where the court is English, in Scotland, or where the court is Scotch, in England, in like manner as the court has jurisdiction in any other case:—*Held*, that this enactment does not enable a summons under the Bastardy Act, 1872, issued by the justices in England to be served on the putative father in Scotland, and therefore where such summons is served in Scotland and the person so served does not appear at the hearing the justices have no jurisdiction to make an affiliation order. The Queen *v.* Thompson - - C. A. 261

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BILL OF SALE — *Building Agreement — Clause vesting Materials in Landowner—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).] An agreement, by a clause in an ordinary building contract, that all building and other materials brought by the builder upon the land shall become the property of the landowner, is not a bill of sale within the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31).—*Brown* v. *Bateman* (Law Rep. 2 C. P. 272) and *Blake* v. *Izard* (16 W. R. 108) followed.—*Reeve* v. *Whitmore* (4 De G. J. & S. 1; 33 L. J. (Ch.) 63) and *Holroyd* v. *Marshall* (10 H. L. C. 191; 33 L. J. (Ch.) 193) distinguished.—Judgment of the Queen's Bench Division (11 Q. B. D. 610) affirmed. Reeves *v.* Barlow - C. A. 436

2. —— *Agreement for Payment by Grantor of Insurance Premiums and production and delivery of Receipts—"Maintenance of the Security"—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).] An agreement in a bill of sale of chattels, that the grantor will pay all premiums necessary for insuring and keeping insured the chattels against loss by fire, and forthwith after every payment in respect of such insurance produce, and, if required, deliver to the grantee the receipt or voucher for the same, is not unnecessary for the maintenance of the security, and does not contravene the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43). Hammond *v.* Hocking - - 291

3. —— *Consideration*, 30*l.*—15*l. repayable on Demand—Immediate Demand—Bill of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).] A bill of sale expressed to be in consideration of 30*l.*, of which 15*l.* is repayable on demand and

BILL OF SALE—*continued.*
the rest by monthly instalments, may, in the absence of evidence that the transaction is a sham, be valid, notwithstanding the Bills of Sale Act (1878) Amendment Act, 1882, s. 12, if 30*l.* is bonâ fide paid to the grantor, even although, at his own request, demand for 15*l.* is immediately made by the grantee, and it is at once returned to him. Davis *v.* Usher - - - 490

4. —— *Form—Several Mortgagees—Consolidation of Securities—Power to seize on any Default—* 45 & 46 *Vict. c.* 43 (*Bills of Sale Act*, 1878, *Amendment Act*, 1882), *ss.* 7, 9.] By a bill of sale made between the grantor and four sets of mortgagees to secure divers sums owing to each respectively, and a further advance by all the mortgagees, the grantor assigned to them certain goods and covenanted separately with each mortgagee to pay on demand the sum owing to each, and it was declared that if default should be made in payment of any sum thereby secured, or if any other default or event mentioned as a cause of seizure in s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882, should be made, it should be lawful for the mortgagees to seize and sell the goods assigned, and repay all the moneys owing. The bill of sale was executed at the foot of a schedule annexed to it:—*Held*, that the bill of sale did not contravene the Bills of Sale Act (1878), Amendment Act, 1882. Melville *v.* Stringer [132

BIRD—Decoy bird—Cruelty - - - 66
See Cruelty to Animals.

BISHOP—Refusal to institute clerk—Action by patron—Ecclesiastical law - 404
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BY-LAW—Validity of—Local Government Acts—Swine kept near dwelling-house 617
See Local Government Acts. 2.

CARRIER—Contagious Diseases (Animals) Act—Proscribed district - - 629
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—— *Brown* v. *Bateman* (Law Rep. 2 C. P. 272) followed - - - - 436
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—— *Burdett* v. *Abbott* (14 East, 148) commented upon and approved - - 271
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—— *Davies* v. *McVeagh* (4 Ex. D. 265) considered - - - - 87
See SHIP.

—— *Fourth City Mutual Benefit Building Society* v. *Williams* (14 Ch. D. 140) commented on - - - - - 423
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—— *Holroyd* v. *Marshall* (10 H. L. C. 191; 33 L. J. (Ch.) 193) distinguished - 436
See BILL OF SALE.

—— *Mullins* v. *Collins* (Law Rep. 9 Q. B. 292) discussed - - - - 360
See LICENSING ACTS.

—— *Reeve* v. *Whitmore* (4 De G. J. & S. 1; 33 L. J. (Ch.) 63) distinguished - 436
See BILL OF SALE.

—— *Rex* v. *Lords Commissioners of Treasury* (4 A. & E. 286) disapproved of - 461
See MANDAMUS.

—— *Saunders* v. *Richardson* (7 Q. B. D. 388) approved - - - - 578
See ELEMENTARY EDUCATION.

—— *Stockdale* v. *Hansard* (9 Ad. & E. 1) commented upon and approved - - 271
See PARLIAMENT. 4.

—— *Webb* v. *Adkins* (14 C. B. 401; 23 L. J. (C.P.) 96) followed - - - 294
See PRACTICE. 17.

CHARGING ORDER — Shares in company — Jurisdiction to order sale - - 287
See PRACTICE. 4.

CHOSE IN ACTION—Assignment of debt—Notice of assignment after assignor's death 511
See ASSIGNMENT OF DEBT. 2.

COMPANY—*Auditor, Right of, to appoint Accountant—Companies Clauses Act*, 1845 (8 *Vict. c.* 16), *s.* 108.] An auditor appointed under the Companies Clauses Act, 1845, is entitled to appoint an accountant under s. 108 of that Act, without the consent of his co-auditor. STEELE *v.* SUTTON GAS CO. - - - - - 68

2. —— *No Power to accept Bills—Acceptance by Directors "for and on behalf" of Company—Personal Liability.*] A bill of exchange payable to order and addressed to the B. and I. Company, which was incorporated under local Acts, and had no power to accept bills, was accepted by the defendants, two of the directors and the secretary of the company, as follows:—"Accepted for and on behalf of the B. and I. Company, G. K., S. F. P., directors; B. W., secretary." The acceptance was in pursuance of a resolution by the company that the bill should be accepted on account of professional services rendered to it by the drawer, who was told when he received the bill that it was given to him on the understanding that he should not negotiate it, and merely as a recognition of the company's debt to him, as the company had no power to accept bills. The bill was indorsed to the plaintiffs for value, and without notice of the understanding between the drawer and the defendants:—*Held*, that upon the dishonour of the bill the defendants were personally liable. By Day, J., on the ground that the defendants as between themselves and the plaintiffs had been guilty of constructive fraud by issuing a bill

COMPANY—*continued.*

which contained an untrue statement that they were authorized to accept it on behalf of the company, or upon the ground that, apart from fraud, they were, as between themselves and a bonâ fide indorsee for value, precluded from denying the truth of any statement contained in the acceptance of a negotiable instrument. By A. L. Smith, J., on the ground that there was evidence of an implied contract by the defendants with the plaintiffs that they were authorized to accept the bill on behalf of the company. WEST LONDON COMMERCIAL BANK *v.* KITSON - - 157

3. —— *Company limited by Guarantee—Mutual Marine Insurance Association—Memorandum and Articles of Association—Liability of Members—Limitation of Liability in the Event of winding up the Association—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 9, 38.] The defendant was the owner of a ship insured and entered in a certain class of a mutual insurance association, which was limited by guarantee and incorporated under the Companies Act, 1862. The object of the association was the mutual insurance of ships of members or in which they were interested. According to its rules a person by entering his ship to be insured, as the defendant had done, became a member of the association, and whilst his ship was insured by the other members of his own class he was an assurer of the vessels of such other members entered in the same class as that in which his own had been so entered. By the memorandum of association the declaration of the undertaking required, by s. 9 of the Companies Act, 1862, on the part of a member of an association limited by guarantee was as follows: "Every member of the association undertakes to contribute to the assets of the association in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the association contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves such amount as may be required, not exceeding 5*l.*" Whilst the defendant's ship continued to be so insured and the defendant was such member the association resolved to be wound up voluntarily:—*Held*, that the defendant was liable to pay his proportion of losses in respect of vessels entered and insured in the same class as his own, and that his liability was not limited to 5*l.*, since the debts and liabilities mentioned in the declaration of undertaking were those of the association as against its members, and in respect of which the 9th section of the statute required such declaration to be contained in the memorandum of association, and were not the debts and liabilities to which the members by the rules of the association were to contribute as insurers or as assured. LION MUTUAL MARINE INSURANCE ASSOCIATION *v.* TUCKER [C. A. 176

4. —— *Unregistered Society—Formation before the Companies Act*, 1862—*Change of Members—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 4.] An association, consisting of more than twenty persons, was formed before the commencement

COMPANY—*continued.*

of the Companies Act, 1862, to receive contributions from the members, and sell the money in hand, from time to time, in shares varying from 20*l.* to 100*l.*, to the highest bidder among them. The premiums paid by the purchasers were divided as profits among all the members. When the amount of the contributions and profits of a member who had purchased a share equalled the amount of such share, or, in the case of a member who did not borrow, when the amount of his contributions and profits equalled the amount of the share in respect of which he had joined, and he was paid off, membership ceased in respect of such share. New members, however, were continually joining, and the existence of the society was continuous:—*Held*, that the association was not "formed" within the meaning of s. 4 of the Act on each occasion of a change of membership, and did not require to be registered under the Act. SHAW *v.* SIMMONS - - - 117

—— Charging orders—Sale of shares - 287
See PRACTICE. 4.

CONFLICT OF LAWS—*Construction and enforcement of a Contract made in England between Merchants residing there, for the delivery in London of Goods shipped at a foreign Port by a foreign Company—Vis Major.*] The defendants, a London firm, contracted in London to sell to the plaintiffs, merchants in London, 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port, at certain prices, according to specified qualities, on board vessels to be provided by the plaintiffs in London, and to be paid for by the plaintiffs in London by cash on or before arrival of the ship or ships at her or their port of destination, less interest at 5 per cent. per annum for the unexpired portion of three months from date of bill of lading, for the full amount of the invoice based on shipping weight.—The defendants caused to be delivered and were paid for 9000 tons of esparto, but failed to deliver the remaining 11,000 tons.—In an action for this breach of contract:—*Held*, affirming the judgment of the Queen's Bench Division, that the contract was an English contract, and to be construed and dealt with according to the law of this country; and, consequently, that it was no answer to say that by the French law (which prevailed at the port of shipment) the defendants were excused from performing their contract if prevented from so doing by "force majeure," viz., the prohibition by the constituted authorities of the export of esparto from Algeria, by reason of an insurrection and consequent hostilities in that country. JACOBS *v.* CRÉDIT LYONNAIS C. A. 589

CONSPIRACY—Two persons indicted for conspiring together—Acquittal or conviction of both - - - - 241
See CRIMINAL LAW. 2.

CONTAGIOUS DISEASES (ANIMALS) ACT, 1878 (41 *& 42 Vict. c.* 74)—*Justices—Jurisdiction—Offences against Act—Carriers—Persons "causing or permitting" Movement of Animals into Proscribed Districts.*] By an Order of Council made under the Contagious Diseases (Animals) Act, 1878, if an animal is moved in contravention of the regulations of any local authority, the person

CONTAGIOUS DISEASES (ANIMALS) ACT, 1878—*continued.*

"causing, directing, or permitting" the movement shall be deemed guilty of an offence against the Act. The local authority of the county of Dorset having by regulations prohibited the movement of animals into their district except under specified conditions, animals were consigned to a place within the district, with through bills from Cork viâ Bristol and a specified route. The appellants were no parties to the contract with the consignor, but in furtherance of the scheme of carriage carried the animals on their railway over a portion of the route to a point outside the county of Dorset, whence they were subsequently carried into that county by another company:—*Held*, that the appellants were liable to be convicted of an offence against the Act as persons "causing, directing, or permitting" the movement of the animals within the meaning of the Order of Council; and that the justices of the county of Dorset had jurisdiction to convict. MIDLAND RAILWAY CO. *v.* FREEMAN - 629

CONTEMPT—Attachment—Solicitor—Order for payment of money - - - 44
See PRACTICE. 5.

COPYRIGHT—*Infringement—Right of representing Dramatic Piece or Entertainment—Performance of Play in Private Room—Admission without Payment—3 & 4 Wm. 4, c. 15, s. 2; 5 & 6 Vict. c. 45, s 20.*] The defendant and others joined in representing a dramatic piece in the board room of a hospital, without the consent of the proprietor of the copyright in the drama. The performance was merely for the entertainment of the nurses, attendants, and others connected with the hospital, who were admitted free of charge:—*Held*, that the room where the drama was represented was not a place of public entertainment, and that the defendant was consequently not liable to damages or penalties under the Copyright Acts, 3 & 4 Wm. 4, c. 15, ss. 1, 2, and 5 & 6 Vict. c. 45, s. 20.—*Semble*, that the right of representing a dramatic piece and of taking proceedings for the infringement of such right is governed by the Act 3 & 4 Wm. 4, c. 15, and is not affected by the later Act, 5 & 6 Vict. c. 45.—*Quære*, whether it is essential, in order to make the room where a play is represented a place of dramatic or public entertainment within 3 & 4 Wm. 4, c. 15, ss. 1, 2, that a charge should be made for admission to it. DUCK *v.* BATES - - - - 79

COSTS—Assignment of bill of costs—Assignee—Signature - - - - 518
See PRACTICE. 6.

—— Interpleader—Power of Master to order plaintiff to pay defendant's costs 100
See PRACTICE. 9.

—— Lands Clauses Acts—Verdict of jury—"Sum previously offered" - 481
See LANDS CLAUSES ACTS.

—— Order for payment—"Final judgment"—Bankruptcy - - - 509
See BANKRUPTCY. 4.

—— Solicitor—Defendant in person - 452
See SOLICITOR.

COUNTY COURT—*Admiralty Jurisdiction—City of London Court—Claim in relation to the car-*

COUNTY COURT—*continued.*

riage of Goods in any Ship—Passengers' Luggage —County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 *Vict. c.* 51), *s.* 2.] Passengers' luggage carried on board a ship is not "goods" within the meaning of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and consequently the Act does not confer jurisdiction to try a claim arising out of the loss of such luggage on a county court having Admiralty jurisdiction. THE QUEEN *v.* JUDGE OF CITY OF LONDON COURT - - - - - 115

—— Action remitted for trial—Trial before judge without jury - - - - 21
See PRACTICE. 7.

—— Motion for new trial—Improper rejection of evidence - - - - - 58
See PRACTICE. 8.

COUNTY RATE—Liability of borough—Main roads - - - - - 239
See HIGHWAY.

COUNTY VOTE—Rent-charge—Actual possession —2 Wm. 4, c. 45, s. 26 - - - 369
See PARLIAMENT. 2.

—— Rent-charge for life or lives below 5*l.* 365
See PARLIAMENT. 3.

COVENANT—Separation deed—Condition precedent—Molestation - - - 539
See HUSBAND AND WIFE.

CREMATION—Burning dead body—Misdemeanor
See CRIMINAL LAW. [247

CRIMINAL LAW—*Burning Dead Body—Misdemeanor—Nuisance—Inquest—Preventing Inquest being held.*] To burn a dead body, instead of burying it, is not a misdemeanor, unless it is so done as to amount to a public nuisance.—If an inquest ought to be held upon a dead body, it is a misdemeanor so to dispose of the body so as to prevent the coroner from holding the inquest. THE QUEEN *v.* PRICE - - - - - 247

2. —— *Conspiracy—Indictment against Two for conspiring together—Acquittal or Conviction of both.*] Where two persons are indicted for conspiring together and they are tried together, both must be acquitted or both convicted. THE QUEEN *v.* MANNING - - - - - 241

3. —— *Defamation—Leave to file Information —Libel upon Deceased Foreign Nobleman—Applicant resident Abroad—Discretion of Court.*] Upon application for leave to file a criminal information in respect of a libel upon a deceased foreign nobleman made by his representative who was not resident in this country:—*Held*, that the Court, in the exercise of its discretion, must reject the application, for the rule to be collected from the modern decisions is that a criminal information for libel can only be granted at the suit of persons who are in some public office or position, and not at the suit of private persons:—*Held*, also, that the fact that the applicant does not reside in this country is a strong reason for rejecting such an application.—*Semble*, that an application for a criminal information for a libel upon a deceased person made by his representative will not be granted. THE QUEEN *v.* LABOUCHERE - 320

4. —— *Larceny—Larceny by Trick—Criminal Law, ringing the Changes.*] The two prisoners

CRIMINAL LAW—*continued.*

by a series of tricks fraudulently induced a barmaid to pay over money of her master to them, without having received from them in return the proper change, the barmaid had no authority to pay over money without receiving the proper change, and had no intention of or knowledge that she was so doing:—*Held* by the Court (Lord Coleridge, C.J., Denman, Hawkins, Williams, and Mathew, JJ.), that the prisoners were properly convicted of larceny. THE QUEEN *v.* HOLLIS [C. C. R. 25

5. —— *Receiving Stolen Goods—Evidence—Guilty Knowledge—Prevention of Crimes Act*, 1871 (34 & 35 *Vict. c.* 112), *s.* 19.] Upon the trial of a prisoner for receiving stolen property with a guilty knowledge, evidence was admitted that shortly before the stealing of the property in question he had been in possession of other stolen property of a similar character, though he had parted with the possession of such other property before the date of the stealing of the property charged in the indictment:—*Held*, by the Court (Lord Coleridge, C.J., Hawkins, Stephen, Williams, and Mathew, JJ.), that such evidence was inadmissible, and did not fall within the words of s. 19 of the Prevention of Crimes Act, 1871. THE QUEEN *v.* CARTER - C. C. R. 522

6. —— *Husband and Wife—Evidence—Larceny by Wife—Witness, Competency of—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 16.] Upon the trial of a married woman jointly with another person for larceny of the property of her husband, the husband was called as a witness against his wife:—*Held*, by the Court (Lord Coleridge, C.J., Hawkins, Lopes, and Mathew, JJ.; Stephen, J., doubting), that the evidence of the husband was improperly received, and that the conviction which had taken place founded upon it was bad as against both the prisoners. THE QUEEN *v.* BRITTLETON [C. C. R. 266

7. —— *Vagrant Act* (5 *Geo.* 4, *c.* 83), *s.* 3—"*Wandering abroad to beg and gather alms*"—*Idle and disorderly Persons—Colliers "on strike."*] Colliers "on strike" who were householders in a colliery district, and had wives and families, went from house to house in a street of a town four miles distant with a waggon inscribed "Children's Bread Waggon," and begged for assistance in money or kind. They were not disorderly. Having been convicted under the Vagrant Act (5 Geo. 4, c. 83), s. 3, which enacts that every person wandering abroad in any public highway to beg or gather alms shall be deemed an idle and disorderly person:—*Held*, that, as it was not their habit and mode of life to wander abroad and beg, they were not within the meaning of the Act, and the conviction was wrong. POINTON *v.* HILL 306

8. —— *Venue—False Pretences, Place of Trial.*] H. wrote and posted at N. in England a letter, addressed to G. at a place out of England, containing a false pretence by means of which he fraudulently induced G. to transmit to N. a draft, for 150*l.* which he there cashed:—*Held*, by the Court (Lord Coleridge, C.J., Denman, Hawkins, Williams, and Mathew, JJ.), that there was jurisdiction to try H. at N., that the pretence was

CRIMINAL LAW—*continued.*
made at N., where also the money obtained by means of it was received. The Queen *v.* Holmes [C. C. R. 23

CROWN—Mandamus—Commissioners of Inland Revenue - - - - 461
See Mandamus.

CRUELTY TO ANIMALS— 12 & 13 *Vict. c.* 92, *ss.* 2, 29—17 & 18 *Vict. c.* 60, *s.* 3—"*Domestic Animals*"—*Birds trained and kept as Decoy Birds.*] Birds kept in a state of captivity and trained as decoy birds for the purpose of bird-catching are "domestic animals" within the meaning of 12 & 13 Vict. c. 92, the Act for the more effectual Prevention of Cruelty to Animals. Colam *v.* Pagett - - - - - 66

DAMAGES—Application for new trial—Power of Court to reduce damages - - 356
See Practice. 13.

DEBT—Assignment—Notice of assignment after assignor's death - - - 511
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—— Mortgage—How far "absolute assignment" within 36 & 37 Vict. c. 66, s. 25 - 347
See Assignment of Debt.

DEFAMATION—Leave to file information—Libel upon deceased foreign nobleman—Applicant resident abroad - - - 320
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—— Particulars of persons to whom slander uttered - - - - - 94
See Practice. 12.

DEMURRAGE—Charterer's option to order to place in dock - - - - 87
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DISTRESS—Lodger—Declaration—Second distress - - - - - 4
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—— Sale before five days—Action by tenant's lodger - - - - 385
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DOMICILE—Residence in Scotland or Ireland—Service of writ - - - 50
See Practice. 15.

DRAMATIC PIECE—Copyright—Proceedings for infringement—Private room - 79
See Copyright.

ECCLESIASTICAL LAW—*Bishop and Patron—Clergy—Benefice—Quare Impedit—Refusal of Bishop to institute Clerk—Grounds of Refusal—Fitness of Clerk—Offences against Ecclesiastical Law.*] A bishop refused to institute a clerk in holy orders to a benefice on the grounds that he had, whilst acting as curate to a former holder of the benefice, habitually committed offences against ecclesiastical law and failed to observe the Book of Common Prayer, by wearing unlawful vestments and doing unlawful acts in respect of matters of ritual when officiating in the communion service; and that he declined to undertake not to repeat the offences in the future. In an action against the bishop in which the patron claimed a declaration that he was entitled to have the clerk instituted:—*Held*, that the defendant

ECCLESIASTICAL LAW—*continued.*
had acted within his discretion in refusing to institute the clerk upon the grounds stated, and was therefore entitled to judgment. Heywood *v.* Bishop of Manchester - - - - 404

ELECTION—Municipal corporation—Nomination paper - - - - 257
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—— Municipal corporation—Occupation of part of dwelling-house - - - 381
See Municipal Corporation.

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See Parliament. 1, 2, 3, 5.

ELEGIT—Bankruptcy—Seizure but not delivery of possession - - - - 224
See Bankruptcy. 7.

ELEMENTARY EDUCATION—*School Board—Action to recover Fees for Tuition—Implied Promise to pay Fees—Action of Debt upon Statutes—Bye-laws—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75)—*Elementary Education Act*, 1873 (36 & 37 *Vict. c.* 86)—*Elementary Education Act*, 1876 (39 & 40 *Vict. c.* 79)—*Elementary Education Act*, 1880 (43 & 44 *Vict. c.* 23).] No action to recover arrears of fees for tuition can be maintained by a school board against the parent of a child attending a public elementary school; for, it being compulsory upon the parent to cause his child to attend a school, his act in sending the child to school is not voluntary, and no promise to pay the fees can be implied; and the Elementary Education Acts, 1870 to 1880, contemplate that the remedy to enforce payment of fees shall be by an attendance order and by summary proceedings before justices and not by action.—*Saunders* v. *Richardson* (7 Q. B. D. 388) approved. School Board for London *v.* Wright C. A. 578

EMPLOYER AND WORKMAN—Apprenticeship deed—Contract not for the benefit of infant—38 & 39 Vict. c. 90, ss. 5, 6 352
See Infant.

—— "Defect in condition of machinery" - 30
See Master and Servant.

—— Notice of injury—Sufficiency - 91
See Master and Servant. 2.

—— "Person engaged in manual labour"—Omnibus conductor - - - 201
See Master and Servant. 3.

EQUITY OF REDEMPTION—Seizure in execution—Duty of sheriff - - 213
See Sheriff.

EVIDENCE—*Witness out of Jurisdiction—Arbitration—Reference of Action and "All Matters in Difference"—"Trial"*—(17 & 18 *Vict. c.* 34, *s.* 1).] When an action and "all matters in difference" between the parties have been referred by consent to an arbitrator, no writ of subpœna will be granted under 17 & 18 Vict. c. 34, s. 1, in order to compel the attendance at the hearing before the arbitrator of witnesses residing within the United Kingdom but out of the jurisdiction of the Queen's Bench Division; for the hearing before the arbitrator is not a "trial" within the meaning of that enactment. Hall *v.* Brand - C. A. 39

—— Criminal law—Receiving stolen goods—Guilty knowledge - - - 522
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EVIDENCE—*continued.*
—— Husband witness against wife — Married Women's Property Act, 1882 (45 & 46 Vict. c. 73), ss. 12, 16 - - - 266
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EXECUTION—Bankruptcy—Application to sell by private contract - - - 162
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EXECUTOR—Action before probate—Stay of proceedings - - - - 294
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FOREIGN LAW—Lex loci—Contract in England between residents for delivery of cargo to be shipped at foreign port by foreign company - - - - 589
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FORFEITURE—Recovery of land—Setting aside judgment—Equitable mortgagees 136
See PRACTICE. 14.

GAMING—*Betting Houses—Information or Advice with respect to Bet or Wager—Advertisement—Betting Acts*, 1853 *and* 1874 (16 *&* 17 *Vict. c.* 119 *and* 37 *Vict. c.* 15).] The Betting Act, 1874, is confined to such bets as are mentioned in the Betting Act, 1853, that is to bets made in any house, office, or place kept for betting, and the Act does not apply to advertisements offering information for the purpose of bets not to be made in any house, office, or place kept for that purpose. COX *v.* ANDREWS - - - - 126
—— Licensed premises—Knowledge of servant —Licensing Acts - - - 360
See LICENSING ACTS.
GARNISHEE ORDER — "Final judgment" — Bankruptcy notice - - 509
See BANKRUPTCY. 4.
GENERAL AVERAGE—Charterparty—Deck cargo jettisoned—"At merchant's risk" 218
See SHIP. 3.

HIGHWAY—*County Rate—Borough Liability of County Rate—Main Roads—Middlesborough Extension and Improvement Act*, 1874 (38 *Vict. c. cviii.*)—*Highways and Locomotive Amendment Act*, 1878 (41 *&* 42 *Vict. c.* 77), *s.* 13.] By a local Act passed in 1874 the limits of the borough of Middlesborough were extended. By s. 20 of that Act it was enacted that the extended area "shall be exempt from all county rates save only in respect of the purposes for which any county rates are now leviable within the existing borough." At the time of the passing of that Act general county rates were leviable within the existing borough for all purposes for which general county rates could be levied in any part of the riding. By s. 13 of the Highways and Locomotive Amendment Act, 1878, any road which has ceased to be a turnpike road in manner described by the Act shall be deemed to be a main road, and one-half of the expenses incurred by the highway authority in the maintenance of such road shall be contributed out of the county rate:—*Held*, that as within the borough existing at the time of the passing of the local Act general county rates were leviable for all purposes, the saving of such liability rendered the exemption in s. 20 inoperative; and therefore the inhabitants of the extended area of the borough were not exempt from liability to pay county rates for the maintenance of a road under s. 13 of the Highways and Locomotive Amendment Act, 1878.—The decision of the Queen's Bench Division affirmed. OVERSEERS OF MIDDLESBOROUGH *v.* JUSTICES OF NORTH RIDING OF YORKSHIRE - - - - C. A. 239

2. —— *Wilful Obstruction—Omission to remove Obstruction—Highway Act*, 1835 (5 *&* 6 *Wm.* 4. c. 50), *s.* 72).] In order to constitute wilful obstruction of a highway within 5 & 6 Wm. 4, c. 50, s. 72, it is not necessary that there should be any act of commission, but the offence may be complete by an omission on the part of the person whose duty it is to remove an obstruction to do so after notice. GULLY *v.* SMITH - - 121
—— Obstruction - - - - 110
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HOUSE—Occupation — Qualification — Municipal election - - - - 381
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HOUSE OF COMMONS—Procedure—Jurisdiction of Courts - - - - 271
See PARLIAMENT. 4.
HUSBAND AND WIFE—*Separation Deed—Contract—Condition Precedent—Independent Covenants — Covenant to pay Annuity — Covenant against Molestation—Molestation, what amounts to.*] *Held*, that covenants in a separation deed, by which respectively the husband covenanted to pay an annuity to a trustee for the wife, and the trustee covenanted that the wife should not molest the husband, must be construed as independent covenants in the absence of any express terms making them dependent, and therefore that a breach of the covenant that the wife should not molest the husband was not an answer to an action for the annuity.—Adultery on the part of the wife, resulting in the birth of a child, is not "molestation" within such a covenant against molestation by the wife. — By Denman, J. It might be molestation within the meaning of the covenant to put forward a child so born in adultery as being the child of the husband. FEARON *v.* EARL OF AYLESFORD - - - 539
—— Criminal law—Husband witness against wife —Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 12, 16 - 266
See CRIMINAL LAW. 6.
—— Order upon husband for maintenance of wife — Amount of relief granted by guardians - - - - 61
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—— Married woman — Third party—Summons for directions - - - 533
See PRACTICE. 18.

INCOME TAX — Insurance company—Different branches of business — Participating policies - - - - 389
See REVENUE.

INDICTMENT — Conspiracy — Two persons indicted together—Acquittal or conviction of both - - - - 241
See Criminal Law. 2.

INFANT—*Apprenticeship Deed—Contract not for Benefit of Infant—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *ss.* 5, 6.] An infant was apprenticed by a deed containing a provision that the master should not be liable to pay wages to the apprentice so long as his business should be interrupted or impeded by or in consequence of any turn-out, and that the apprentice might during any such turn-out employ himself in any other manner or with any other person for his own benefit:—*Held*, that, this provision not being for the benefit of the infant, the apprenticeship deed could not be enforced against the infant under the Employers and Workmen Act, 1875, ss. 5, 6. Meakin *v.* Morris - - - - 352

INFORMATION—Libel—Discretion of Court 320
See Criminal Law. 3.

INJUNCTION—Licence to use metropolitan stage carriage - - - - 105
See Metropolitan Stage Carriage.

INN—Gaming — Knowledge of servant — Mens rea - - - - - 360
See Licensing Acts.

—— Licence—Renewal of licence—Mortgagor and mortgagee - - - 620
See Licensing Acts. 2.

INNKEEPER—*Liability for Property of Guest—Temporary Refreshment.*] The plaintiff arrived at Carlisle with the intention of spending the night at the defendants' hotel, which adjoined the railway station. He delivered his luggage to one of the porters of the hotel, but, after reading a telegram which was waiting for him, decided not to spend the night at Carlisle, and went into the coffee-room to order some refreshments. He was not able to obtain in the coffee-room exactly what he required, and went into the station refreshment-room, which was under the same management as the hotel, and connected with it by a covered passage. Shortly afterwards he went out, telling the porter to lock up his luggage, and it was locked up in a room near the refreshment-room. On his return he found that part of it was missing:—*Held*, that at the time of the loss of the plaintiff's goods there was no evidence of the relation of landlord and guest between him and the defendants, so as to make them responsible. Strauss *v.* County Hotel and Wine Co. - 27

INQUEST—Prevention of—Burning of dead body—Misdemeanor - - - 247
See Criminal Law.

INSURANCE (MARINE) — *Insurable Interest — Goods in which Property had not passed to the Assured.*] By a contract in writing D. & Co., sugar merchants in London, agreed to sell to the plaintiff, a Bristol merchant, 200 tons of sugar of a certain description, to be shipped from Hamburg to Bristol at the price of 21*s.* 9*d.* per cwt. net f. o. b. Hamburg; payment by cash in London in exchange for bill of lading. In order to satisfy such contract and also a similar contract for the sale of sugar to another Bristol merchant, D. & Co.'s forwarding agents at Hamburg shipped there

INSURANCE (MARINE)—*continued.*
about 400 tons in 3900 bags of sugar of the description contracted for, and consigned the same to "order Bristol." It was the usual course of business of D. & Co., as the plaintiff knew, not to appropriate specific bags of sugar to any particular contract at the time of shipment, but to apportion the bags and the bills of lading representing them between their different buyers at the port to which they were shipped after they had been shipped, and after D. & Co. had received the bills of lading.—The *City of Dublin*, on which such shipment was made, was lost with her cargo on the voyage before any appropriation had been so made by D. & Co., but 2000 bags representing 200 tons were subsequently appropriated by D. & Co. to the plaintiff's contract and an invoice of the same sent to the plaintiff, who thereupon paid the contract price, and obtained the bill of lading.—The plaintiff, who had a "floating" policy of insurance on "goods" declared thereunder on the *City of Dublin* in respect of these 200 tons of sugar:—*Held*, in an action on such policy against the defendant who had underwritten it, that the plaintiff had an insurable interest in such sugar notwithstanding no property in it had passed to him before the loss, inasmuch as, according to the terms f. o. b. in a contract of sale made under the above circumstances, the sugar was shipped at the risk of the plaintiff, who was liable to pay against bill of lading whether the sugar arrived or not. Stock *v.* Inglis - - - - - C. A. 564

—— Mutual association—Limitation of liability
See Company. 3. [176

INSURANCE COMPANY—Income tax—Different branches of business — Participating policies - - - - 389
See Revenue.

INTERPLEADER—Application for new trial—Court of Appeal - - - 103
See Practice. 11.

—— Attachment of debts—Unliquidated claim—"Debt" attachable - - - 525
See Practice. 3.

—— Costs—Power of Master to order plaintiff to pay defendant's costs - - 100
See Practice. 9.

—— Service out of jurisdiction - - 171
See Practice. 10.

IRELAND—Residence in Ireland — Service of writ - - - - - 50
See Practice. 15.

JUDGMENT—Setting aside—Applicant not party to record - - - - 165
See Practice. 16.

JURISDICTION—Adjudication of bankruptcy—Failure of proceedings after January 1st, 1884—Rehearing - - - 497
See Bankruptcy. 2.

—— Justices — Contagious Diseases (Animals) Act—Movement of animals into proscribed districts - - - 629
See Contagious Diseases (Animals) Act.

JUSTICES — Jurisdiction—Bastardy—Service of summons in Scotland - - 261
See BASTARDY.

LANDLORD AND TENANT—*Distress—Lodger's Goods—Sale of Distress before Expiration of Five Days—2 Wm. & M. sess.* 1, *c.* 5, *s.* 2—*Lodgers' Goods Protection Act*, 1871 (34 & 35 *Vict. c.* 79), *ss.* 1, 2.] A landlord, having on the 17th of October distrained for rent goods of his tenant's lodger upon the demised premises, sold the same on the 22nd, i.e., before the expiration of five clear days from the distress, contrary to the provisions of 2 Wm. & M. sess. 1, c. 5, s. 2:—*Held*, that an action was maintainable by the lodger against the landlord for so selling his goods. SHARP *v.* FOWLE - - - - 385

2. —— *Lodger—Lodgers' Goods Protection Act*, 1871 (34 & 35 *Vict. c.* 79), *s.* 1—*Declaration by Lodger inoperative against subsequent Distress—Illegal Distress—Voluntary Abandonment.*] A declaration under the Lodgers' Goods Protection Act, s. 1, will not protect a lodger's goods against seizure and sale by a superior landlord for rent due from his immediate tenant, unless it has been made after the distress has been levied or authorized or threatened; a declaration is inoperative against a distress subsequently levied, which has not been authorized or threatened before the declaration is made.—The plaintiff was a lodger in one of three rooms let to T. who was the immediate tenant of the defendant. Rent to the amount of 8*l.* being due from T. to the defendant, the defendant distrained the goods in the rooms including the plaintiff's. She thereupon made a declaration under the Lodgers' Goods Protection Act, s. 1, which was correct in all respects. T. and the defendant came to an arrangement whereby 1*l.* was to be paid down, and the remaining 7*l.* by instalments; and the distress was thereupon withdrawn by the defendant. None of the agreed instalments having been paid by T., and a further sum of 1*l.* having accrued due for rent, the defendant afterwards levied a second distress for the sum of 8*l.*, under which the plaintiff's goods were again seized and sold. She made no further declaration under the Lodgers' Goods Protection Act, but she owed no rent to T.:—*Held*, that no action of trespass would lie against the defendant for distraining the plaintiff's goods; for the declaration made at the time of levying the first distress was ineffectual against the second, and the first distress had not been voluntarily abandoned. THWAITES *v.* WILDING [C. A. 4

LANDS CLAUSES ACTS—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 38, 51—*Costs—Verdict of Jury—"Sum previously offered."*] By s. 38 of the Lands Clauses Consolidation Act, 1845, the promoters of an undertaking, before issuing their warrant for causing a jury to be summoned in cases of disputed compensation, shall give not less than ten days' notice of their intention to summon a jury to the other party, and in such notice shall state what sum of money they are willing to give for the interest in the lands sought to be purchased from him, and for the damage to be sustained by him by the execution of the works; and by s. 51, on every such inquiry

LANDLORD AND TENANT—*continued.*

before a jury where the verdict of the jury shall be given for a greater sum "than the sum previously offered" by the promoters, all the costs of the inquiry shall be borne by the promoters, but if the verdict be given for a less sum the costs shall be borne equally between the parties in the manner specified in that section.—In a proceeding to take and purchase the claimant's lands under the Lands Clauses Consolidation Act, 1845, the promoters, on the 9th of March, gave him the notice required by s. 38, and stated that they were willing to give him 600*l.* as and for purchase-money and compensation. On the 19th of March the promoters served a second notice upon the claimant that they were willing, and thereby offered, to pay 900*l.* as purchase-money and compensation. This notice did not refer to the previous one. Neither offer was accepted by the claimant, and on the 29th of March the promoters issued their warrant for causing a jury to be summoned, who assessed the sum to which the claimant was entitled at 750*l.*—*Held*, first, that in cases to which s. 38 was applicable the words "the sum previously offered" in s. 51 applied only to an offer made under s. 38; secondly, that the promoters were not entitled to rely upon their second offer of 900*l.* as an offer made under s. 38, and that the costs of the inquiry must, therefore, be borne by them. THE QUEEN *v.* SMITH - - - - 481

LARCENY—By wife—Evidence of husband 266
See CRIMINAL LAW. 6.
—— "Ringing the changes" - - 25
See CRIMINAL LAW. 4.
LIBEL—Information—Discretion of Court 320
See CRIMINAL LAW. 3.

LICENSING ACTS—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 17—*Suffering Gaming on Licensed Premises—Knowledge of Servant—Mens rea.*] Where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person employed on the premises, but there was no evidence to shew any connivance or wilful blindness on the part of the licensed person, and it did not appear that the servant was in charge of the premises:—*Held*, that the justices were right in refusing to convict the licensed person of suffering gaming on the premises under the Licensing Act, 1872, s. 17.—*Mullins* v. *Collins* (Law Rep. 9 Q. B. 292) discussed. SOMERSET *v.* HART - - - - - 360

2. —— *Inn—Licence—Justices—Renewal of Licence—Mortgagor and Mortgagee—Appeal—Quarter Sessions*—9 *Geo.* 4, *c.* 61, *s.* 27—32 & 33 *Vict. c.* 27, *s.* 19.] The tenant and occupier of a house, licensed for the sale of beer on the premises, in 1876 assigned all his interest in the premises for the residue of his term of years, and the benefit of the licence, to the appellants by way of first mortgage to secure the repayment of moneys advanced by them; and by the mortgage deed irrevocably constituted the appellants his attorneys, in his name, and as his act and deed, to do all acts necessary to procure a transfer of the licence. In 1883, the moneys secured by the mortgage being still unpaid, the occupier sent a written application for a renewal of his licence

LICENSING ACTS—*continued*
to the justices at their annual licensing meeting, and they adjourned the hearing of the application. At the adjourned hearing the appellants applied, as mortgagees and under their power of attorney, for a renewal of the licence to the occupier, who appeared, but stated that he did not wish for a renewal. No objection was made to the renewal on any of the grounds specified in 32 & 33 Vict. c. 27, which Act applied to the occupier's licence. The justices refused the application, and the appellants appealed to quarter sessions in their own names as mortgagees, and also as attorneys of the occupier, and in his name, and for and on his behalf. At the hearing the occupier again appeared, and stated that he did not wish the licence to be renewed, and the quarter sessions thereupon affirmed the order of the licensing justices:—*Held*, first, that the appellants were persons aggrieved, within 9 Geo. 4, c. 61, s. 27, by the refusal of the licensing justices to renew the occupier's licence; and were therefore entitled to appeal to quarter sessions; secondly, that upon the facts stated the licensing justices and the court of quarter sessions were bound to grant the application of the appellants for a renewal of the licence to the occupier. Garrett *v.* Justices of Marylebone [620

LIQUIDATION—Bankruptcy Act, 1869—Bankruptcy Act, 1883 - - - - 334
See Bankruptcy.

LOCAL GOVERNMENT ACTS—*Justices of the Peace, Jurisdiction of—Summary Proceedings—Expenses of sewering Street—Appeal to Local Government Board—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 268.] Upon the hearing of a complaint preferred before a police magistrate by the urban authority of the district acting under s. 150 of the Public Health Act, 1875, to recover the amount apportioned upon a frontager in respect of expenses incurred by the urban authority in sewering, &c., a street, the frontager objected that the plans referred to in the notice requiring him to execute the work, shewed that part of the work in respect of which upon his failure to comply with the notice the expenses were incurred, was executed upon land belonging to private owners:—*Held*, that, as part of the work was executed on a street, the urban authority had power to fix the sum to be apportioned, and the magistrate had jurisdiction to entertain the complaint, and could only make an order for payment of the apportioned sum, and if the frontager was aggrieved by what the urban authority had done his only remedy was to appeal to the Local Government Board under s. 268 of the Public Health Act, 1875. Wake *v.* Mayor, &c., of Sheffield - - C. A. 142

2. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 44, 276—*By-law, Validity of—Nuisance—Swine kept near Dwelling-houses.*] A rural sanitary authority, purporting to act under the powers of ss. 44 and 276 of the Public Health Act, 1875, made a by-law prohibiting the keeping of swine within the distance of fifty feet from any dwelling-house within their district:—*Held*, that the by-law was unreasonable, and therefore bad. Heap *v.* Burnley Union - - - 617

LOCAL GOVERNMENT ACTS—*continued.*
3. —— *Water—Supply of "Pure and Wholesome" — Contamination from Leaden Pipes — Deleterious Effect on Consumer — Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 35—*Special Act* (32 & 33 *Vict. c. cx.*).] The defendants were empowered by a special Act (32 & 33 Vict. c. cx.) incorporating the Waterworks Clauses Act of 1847 (10 & 11 Vict. c. 17), with the exception of certain provisions, to supply water for domestic use within the limits and from the sources described in their Act.—By s. 66 of the special Act the defendants were entitled to prescribe the material to be used for service-pipes by persons supplied with water, and by by-laws the defendants prescribed that the material might be either lead or cast-iron. Leaden service-pipes were, upon the application of the landlord of the plaintiff's house and of the plaintiff, laid down by the defendants from their mains to the house at the expense of the landlord and the plaintiff. The service-pipes when laid belonged to the consumer of the water supplied through them. —By the Waterworks Clauses Act, 1847, s. 35, "the undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act, who shall be entitled to demand a supply, and shall be willing to pay water-rate for the same." Water which was pure and wholesome in the mains of the defendants, was supplied by them to the plaintiff, but in its passage from the mains through the service-pipes it was contaminated by the lead, and he, using the water, suffered from lead-poisoning. He sued the defendants for injuries sustained from impure and unwholesome water:—*Held*, that he had no cause of action.—Judgment of Mathew, J. (10 Q. B. D. 124), affirmed. Milnes *v.* Mayor, &c., of Huddersfield - - - - - C. A. 443

—— Penalty—Officer interested in contract—Rescission by Crown - - 530
See Penalty.

LODGER—Distress—Declaration—Second distress - - - - - 4
See Landlord and Tenant. 2.

—— Sale of distress before expiration of five days - - - - - 385
See Landlord and Tenant.

LUNATIC—Bankruptcy—Leave to committee to file declaration of insolvency - 332
See Bankruptcy. 8.

MANDAMUS — *Servants of the Crown — Commissioners of Inland Revenue—Return of Probate Duty—5 & 6 Vict. c.* 79, *s.* 23.] Sect. 23 of 5 & 6 Vict. c. 79, provides for the return by the Commissioners of Stamps and Taxes of probate duty on proof by oath and proper vouchers to their satisfaction of the payment of debts of the deceased, whereby the amount of probate duty payable on the estate is reduced below the amount which has been paid. By a subsequent Act the Commissioners of Inland Revenue are substituted for the Commissioners of Stamps and Taxes. On an application by an administrator

MANDAMUS—*continued.*

for a mandamus to the commissioners to pay to the applicant the amount of duty overpaid by him, on the ground that he had supplied evidence of overpayment and had no other legal remedy:—*Held*, that the mandamus ought not to issue, for the statute created no duty between the commissioners and the applicant, whose remedy, if the decision of the commissioners could be reviewed, was by petition of right.—*Rex* v. *Lords Commissioners of the Treasury* (4 A. & E. 286) disapproved of. *In re* NATHAN - C. A. 461

MASTER AND SERVANT—*Employer's Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1—"*Defect in condition of machinery*"—*Machine unsuited for Purpose to which it was applied.*] The Employers' Liability Act, 1880 (43 & 44 Vict. c. 42)—which gives a workman a right of action against his employer for personal injury by reason of any defect in the condition of the machinery used in the business of the employer—applies to a case where the machine, though not defective in its construction, was, under the circumstances in which it was used, calculated to cause injury to those using it. The deceased, a workman in the employment of the defendants, was killed by a piece of coke falling from a lift used at a blast furnance belonging to them. The lift consisted of two platforms which ascended and descended alternately, and at the time when the deceased was injured he was removing empty barrows from the platform which was at rest at the bottom of the lift. There was evidence that the accident arose either from the sides of the lift not being fenced so as to prevent coke from falling over, or from the lower platform not being roofed so as to protect those working on it from falling coke:—*Held*, that under the circumstances there was a "defect in the condition" of the lift for which the defendants were liable. HESKE *v.* SAMUELSON & Co. [30

2. —— *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 7—*Notice of Injury—Defect or Inaccuracy in Notice—Omission of Date of Injury.*] Sect. 4 of the Employers' Liability Act, 1880, provides that an action to recover compensation under the Act shall not be maintainable unless notice of injury is given as provided by the Act. By s. 7, the notice shall state (inter alia) the date of the injury; and "a notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein" unless the judge who tries the action shall be of opinion that the defendant is prejudiced in his defence by such defect or inaccuracy, and that it was for the purpose of misleading. A notice of injury given under s. 4 omitted to state the date of the injury, and the judge at the trial found that the defendant was not prejudiced in his defence by the omission, and that it was not for the purpose of misleading:—*Held*, that the omission of the date was a "defect or inaccuracy" in the notice within the meaning of s. 7, and therefore did not render the notice invalid. CARTER *v.* DRYSDALE - 91

3. —— *Negligence—Common Employment—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 5—*Railway Company—Person having "Charge or Control" of Points.*] In an

MASTER AND SERVANT—*continued.*

action for compensation under the Employers' Liability Act, 1880, the evidence shewed that it was the duty of F., a workman employed in the signal department of the defendants' railway, to clean, oil, and adjust the points and wires of the locking apparatus at various places along a portion of the line, and to do slight repairs, that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the points and locking gear, which were moved and worked by men in the signal boxes, being kept in proper condition, and that F. having taken the cover off some points and locking gear in order to oil them, negligently left it projecting over the metals of the line, whereby injury was caused to a fellow workman:—*Held*, affirming the decision of the Queen's Bench Division, that there was no evidence for the jury that F. had "charge or control" of the points within the meaning of s. 1, sub-s. 5, of the Employers' Liability Act, 1880, so as to make the defendants liable for his negligence. GIBBS *v.* GREAT WESTERN RAILWAY Co. C. A. 208

4. —— *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 8—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—"*Journeyman*," "*Labourer*," "*Person engaged in Manual Labour*"—*Omnibus Conductor.*] An omnibus conductor engaged at daily wages, paid daily, is not a "person to whom the Employers and Workmen Act, 1875, applies," and therefore is not entitled to the benefit of the Employers' Liability Act, 1880. MORGAN *v.* LONDON GENERAL OMNIBUS Co. 201

—— Negligence—Unsafe premises—Knowledge of master—Ignorance of servant - 493
See NEGLIGENCE.

METROPOLITAN STAGE-CARRIAGE—*Licence to use—Manager—Injunction*—2 & 3 *Wm.* 4, *c.* 120—32 & 33 *Vict. c.* 115, *and Rules thereunder.*] The plaintiff as manager of an omnibus company became, under the provisions of the statutes and rules for the regulation of metropolitan stage-carriages, the licensee of their vehicles. Having ceased to be such manager:—*Held*, that he was entitled to an injunction to restrain the company from continuing to use his name upon the number plates affixed to their carriages. HODGES *v.* LONDON TRAMS OMNIBUS Co. - - - 105

MISDESCRIPTION—Particulars of sale—Acceptance of conveyance - - 32
See VENDOR AND PURCHASER.

MOLESTATION—Separation deed—Covenant 539
See HUSBAND AND WIFE.

MORTGAGE—*Foreclosure—Priorities—Tacking—Receipt by Trustees of Building Society*—6 & 7 *Wm.* 4, *c.* 32, *s.* 5—*Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 7—*Land Transfer Act*, 1875 (38 & 39 *Vict. c.* 87), *s.* 129.] The lessee of a term, in November, 1865, mortgaged it to the trustees of a building society of which he was a member, to secure the payment by him of all moneys which might become due from him pursuant to the rules of the society. In September, 1868, the lessee of the term again mortgaged it to the plaintiff to secure the sum of 70*l.* then due from him to the plaintiff, and such further sums as should thereafter be advanced by the

MORTGAGE—*continued.*

plaintiff. Notice of the mortgage to the plaintiff was not given to the building society.—Previously to June, 1875, the lessee of the term applied to the defendants to advance to him the sum of 150*l.* on the security thereof. He informed them that the property was subject to the mortgage to the building society, but was not subject to any other incumbrance. In July, 1875, the defendants paid to the trustees of the building society the sum of 57*l.* 18*s.* 11*d.*, being the full amount due from the lessee of the term, and thereupon the trustees, under 6 & 7 Wm. 4, c. 32, s. 5, signed a receipt indorsed on the deed of mortgage to the society, acknowledging that all moneys intended to be secured by the mortgage to the building society had been paid. In the same month the defendants paid to the lessee of the term the sum of 92*l.* 1*s.* 1*d.*, being the balance of the sum of 150*l.* agreed to be advanced, and thereupon he executed a mortgage of the term to the defendants to secure payment of the sum of 150*l.* The lessee of the term afterwards became insolvent. The present action for foreclosure having been brought in a county court, the judge, by his decree, declared that the hereditaments were subject, first, to a charge of what might be due to the defendants in respect of the 57*l.* 18*s.* 11*d.* paid by them to the building society; secondly, to a charge of what might be due to the plaintiff by virtue of the mortgage to him; thirdly, to a charge of what might be due to the defendants on the security of their mortgage, so far as the same might not be included in the first charge: —*Held*, affirming the decision of the Queen's Bench Division, that the priorities were correctly ascertained, and that the decree of the county court was right.—Per Brett, M.R., and Bowen, L.J., that the present case fell within the principles laid down in *Pease* v. *Jackson* (Law Rep. 3 Ch. 576).—Per Baggallay, L.J., first, on the authority of *Pease* v. *Jackson* (Law Rep. 3 Ch. 576), that the defendants had the better equity, and consequently the better right to call for the legal estate, and that the legal estate in the property comprised in the mortgage to the building society had vested in the defendants by virtue of the indorsed receipt; nevertheless that the security acquired by the defendants by reason of the legal estate becoming vested in them, did not extend beyond the amount advanced by them to pay off the building society, and that, as regarded the further advance, they were incumbrancers puisne to the plaintiff; secondly, that notwithstanding the Land Transfer Act, 1875, s. 129, the defendants, owing to the Vendor and Purchaser Act, 1874, were precluded from treating the property vested in them as security for the further sum advanced by them to the lessee of the term. —*Fourth City Mutual Benefit Building Society* v. *Williams* (14 Ch. D. 140) commented on. ROBINSON *v.* TREVOR - - - - - C. A. 423

MORTGAGE—Action for recovery of land—Application by equitable mortgagee to set aside judgment - - - 136
See PRACTICE. 14.

—— Of debt — How far absolute assignment within 36 & 37 Vict. c. 66, s. 25 - 347
See ASSIGNMENT OF DEBT.

MORTGAGE—*continued.*

—— Several mortgagees—Consolidation of securities—Bill of sale - - - - 132
See BILL OF SALE. 4.

MUNICIPAL CORPORATION—*Municipal Franchise — Qualification — Inhabitant Householder— Dwelling-house, Occupation of part of—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 5—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 9, 31.] Occupation of part of a dwelling-house, for the purposes of a private dwelling only, constitutes occupation of a "house" within ss. 9 and 31 of the Municipal Corporations Act, 1882, so as to confer the municipal franchise upon the occupier. GREENWAY *v.* BACHELOR. ALDRIDGE'S CASE. 381

2. —— *Municipal Elections Act*, 1875 (38 & 39 *Vict. c.* 40), *s.* 1, *sub-s.* 2—*Nomination Paper— Christian Name of Candidate — Abbreviation of "William."*] A nomination paper at the election of a town councillor pursuant to the Municipal Elections Act, 1875, sufficiently states the christian name "William," of the person nominated by the abbreviation "Wm." HENRY *v.* ARMITAGE [C. A. 257

NEGLIGENCE—*Master and Servant—Unsafe Premises — Knowledge of Master—Ignorance of Servant.*] In an action of negligence brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew but that the servant was ignorant of the danger. GRIFFITHS *v.* LONDON AND ST. KATHARINE DOCKS CO. - - - - 493

—— Common employment—Master and servant
See MASTER AND SERVANT. 3. [208

—— Railway company—Level crossing - 70
See RAILWAY COMPANY.

—— Tramway—Road authority - - 16
See TRAMWAY.

NEW TRIAL—Power to reduce damages 356
See PRACTICE. 13.

NOTICE — Assignment of debt—Death of assignor - - - - 511
See ASSIGNMENT OF DEBT. 2.

—— Of objections—List of county voters—Omission of date - - - - 373
See PARLIAMENT. 5.

NUISANCE—*Obstruction on a Highway.*] The defendant farmed land on either side of a highway. His servants removed a roller from one of his fields across the highway to the gate of the opposite field, and, taking away the horses, left the roller on the green-sward at the roadside with its shafts turned up (but projecting a few inches over the metalled part of the road), intending it to remain there until it should suit their convenience to draw it away. The plaintiff's wife drove past the spot, and her pony shied at the roller, overturned the carriage, and caused her death.—In an action under Lord Campbell's Act (9 & 10 Vict. c. 90), the jury found that the accident was caused by an unreasonable user by the defendant of the highway:—*Held*, that the verdict was warranted by the evidence, and that the

NUISANCE—*continued.*
plaintiff was entitled to judgment. WILKINS *v.* DAY - - - - - - 110
NUISANCE—Burning dead body - - 247
See CRIMINAL LAW.

OMNIBUS — Conductor—Employer and Workmen Act, 38 & 39 Vict. c. 90, s. 10; 43 & 44 Vict. c. 52, s. 8 - - 201
See MASTER AND SERVANT. 4.
—— Manager — Injunction to restrain use of name - - - - 105
See METROPOLITAN STAGE CARRIAGE.

PARLIAMENT—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 15, *sub-s.* 2; *s.* 28, *sub-s.* 15—*Borough Franchise—Registration of Voters—Lists—Divisions of List—Transfer of Names—Objection to Qualification for One Franchise.*] Sect. 15 of the Parliamentary and Municipal Registration Act, 1878, enacts that where the whole or part of the area of a municipal borough is co-extensive with or included in the area of a parliamentary borough, the lists of parliamentary voters shall, so far as practicable, be made out and revised together; and specifies the mode in which overseers of parishes shall make out the lists. By sub-s. 2, where the parish is situate wholly or partly both in the parliamentary borough and the municipal borough, the lists shall be made out in three divisions: Division I., shall comprise the names of the persons entitled both to be registered as parliamentary voters and to be enrolled as burgesses: Division II., shall comprise the names of the persons entitled to be registered as parliamentary voters, but not to be enrolled as burgesses: Division III., shall comprise the names of the persons entitled to be enrolled as burgesses, but not to be registered as parliamentary voters. By s. 28, sub-s. 15, where a list is made out in divisions, the revising barrister shall place the name of any person in the division in which it should appear according to the result of the revision, regard being had to the title of the person to be on the list both as a parliamentary voter and a burgess, or only in one of those capacities, and shall expunge the name from the other division (if any) in which it appears.—An objection in respect only of a voter's qualification for the parliamentary franchise having been taken to the retention of his name in Division I., the revising barrister struck the name off Division I.; and was thereupon asked to place it in Division III., but refused so to do unless proof was given of a qualification entitling the voter to be on the burgess roll:—*Held*, that the decision of the revising barrister was right, and that he was not bound, under s. 28, sub-s. 15, to place the name in Division III. GREENWAY *v.* BACHELOR. JACOB'S CASE - - - 376

2. —— *County Vote — Rent-charge — Actual Possession under* 2 *Wm.* 4, *c.* 45, *s.* 26—*Statute of Uses*, 27 *Hen.* 8, *c.* 10.] A. being possessed of a rent-charge issuing out of freehold lands, granted it unto B., C., and D., and their heirs, to hold the same unto B., C., and D., and their heirs, to the use of A., B., C., and D., their heirs and assigns for ever, in equal one-fourth shares as tenants in common:—*Held*, that all the grantees took under the Statute of Uses, and that by force of the statute and on the authority of *Heelis* v. *Blain* (18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88), they were from the date of the deed in actual possession of their shares of the rent-charge within s. 26 of 2 Wm. 4, c. 45. LOWCOCK *v.* OVERSEERS OF BROUGHTON - - - - - 369

3. —— *County Vote—Rent-charge for Life or Lives below value of* 5*l.—Occupation—Reform Act*, 1832 (2 *Wm.* 4, *c.* 45), *ss.* 18, 26.] By s. 18 of the Reform Act, 1832, no person shall be entitled to a county vote in respect of any freehold lands or tenements of which he may be seised for a life or lives, except he shall be "in the actual and bonâ fide occupation of such lands or tenements," or except the same shall be of the clear yearly value of not less than 10*l.* (reduced to 5*l.* by a subsequent Act):—*Held*, that a rent-charge for life below the yearly value of 5*l.*, being incapable of occupation, was not within the exception in s. 18, and therefore did not confer a county vote. DRUITT *v.* OVERSEERS OF CHRISTCHURCH - - - - - - 365

4. —— *House of Commons—Internal Regulation of its own Procedure—Parliamentary Oaths Act*, 1866 (29 *Vict. c.* 19).] The House of Commons is not subject to the control of her Majesty's Courts in its administration of that part of the statute law which has relation to its internal procedure only. What is said or done within its walls cannot be inquired into in a court of law.—A resolution of the House of Commons cannot change the law of the land. But a Court of law has no right to inquire into the propriety of a resolution of the House restraining a member from doing within the walls of the House itself something which by the general law of the land he had a right to do, viz., take the oath prescribed by the Parliamentary Oaths Act, 1866 (29 Vict. c. 19).—An action will not lie against the Serjeant-at-Arms of the House of Commons for excluding a member from the House in obedience to a resolution of the House directing him to do so; nor will the Court grant an injunction to restrain that officer from using necessary force to carry out the order of the House.—The plaintiff, having been returned as member for the borough of N., required the Speaker of the House of Commons to call him to the table for the purpose of taking the oath required by 29 Vict. c. 19. In consequence of something which had transpired on a former occasion the Speaker declined to do so: and the House, upon motion, resolved "that the Serjeant-at-Arms do exclude Mr. B. (the plaintiff) from the House until he shall engage not further to disturb the proceedings of the House."—In an action against the Serjeant-at-Arms praying for an injunction to restrain him from carrying out this resolution:—*Held*, that, this being a matter relating to the internal management of the procedure of the House of Commons, the Court of Queen's Bench had no power to interfere.—*Burdett* v. *Abbott* (14 East, 148), and *Stockdale* v. *Hansard* (9 Ad. & E. 1) commented upon and approved. BRADLAUGH *v.* GOSSETT - - - - 271

5. —— *Notice of Objection—Omission of Date*

PARLIAMENT—*continued.*

—*Parliamentary Registration Act*, 1843 (6 & 7 *Vict. c.* 18), *s.* 7.] Where a notice of objection to a person on the list of voters for any county is delivered to overseers and is defective under the Parliamentary Registration Act, 1843, s. 7, the defect is not cured by the publication by the overseers, under s. 8, of the name of the person objected to.—The omission of a part of the date from such a notice is a defect which invalidates it, and cannot be amended. Freeman *v.* Newman - - - - - - 373

PARTICULARS—Of persons to whom slander was uttered - - - - 94
See Practice. 12.

PAYMENT—After bankruptcy notice—Promissory note - - - - 506
See Bankruptcy. 3.

PENALTY—*Remission*—22 *Vict. c.* 32—*Local Government Acts—Officer interested in Contract with Local Authority—Local Government Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 193.] Under 22 Vict. c. 32—which enables the Crown to remit penalties imposed by statute on convicted offenders—there is no power to remit the penalty to which the officers of local authorities are liable under s. 193 of the Local Government Act, 1875, for being interested in any contract made with such local authorities. Todd *v.* Robinson - - - 530

POLICE CONSTABLE—Allowance—Attachment of debt - - - - - 8
See Practice. 2.

POOR-LAW—*Divided Parishes Act* (39 & 40 *Vict. c.* 61), *s.* 35—*Widow and Children—Birth Settlement of Father—Derivative Settlement.*] Upon appeal against an order for the removal of a widow and her children, it appeared that the widow had acquired no settlement since her husband's death. Her husband, the father of her children, was born in the appellant parish, but never acquired a settlement for himself, and there was no evidence as to the settlement of his parents:—*Held*, that under 39 & 40 Vict. c. 61, s. 35, the children took a settlement from their father in the appellant parish, and that the order for their removal was right. Guardians of Liverpool *v.* Overseers of Portsea - - - - - - 303

2. —— *Maintenance of Married Woman, Order upon Husband in respect of*—31 & 32 *Vict. c.* 122, *s.* 33.] A husband cannot, under 31 & 32 Vict. c. 122, s. 33, be ordered by justices to pay for the maintenance of his wife a weekly sum greater than the amount of the relief granted to her by the guardians. [By Stephen and Mathew, JJ., Lord Coleridge, C.J., dissenting.] Dinning *v.* Guardians of the South Shields Union 61

POOR-RATE—*Rateable Subject under* 43 *Eliz. c.* 2—*Telegraph Wires—Exclusive Occupation—License of Exclusive Use.*] By agreement between a telegraph company and the Postmaster-General, the latter covenanted with the company that he would provide, and thenceforth during the continuance of the agreement keep appropriated and maintain for the exclusive use of the company certain telegraph wires, called in the agreement "special wires," between the landing-place of a foreign telegraphic cable near the Land's End and an office of the company at Penzance, and thence to their office in London, with the necessary translators for working them, and a pneumatic tube; such wires, &c., to remain the property of the Postmaster-General,—the Postmaster-General to repair all accidental defects or interruptions to the working of the wires, &c., but to be paid for making good any damage to the wires occasioned by the neglect or default of the company or their servants; the company not to use the wires for the transmission of any except certain specified messages. And, in consideration of the appropriation and maintenance by the Postmaster-General of the wires, translators, batteries, and pneumatic tube, the company covenanted to pay him certain rents; and they also covenanted not to part with the possession of the special wires or any of them, or underlet or assign the benefit of the agreement, without the consent of the Postmaster-General; and that, in the event of their doing so, the Postmaster General was to be at liberty to determine the contract by notice: and it was further provided that, upon the expiration or determination of the agreement, it should be lawful for the Postmaster-General to resume the possession of the special wires, &c. The telegraph posts remained the property of the Postmaster-General, and carried between Penzance and London several wires beyond those appropriated to the use of the company:—*Held*, —Lord Coleridge, C.J., doubting,—that this agreement did not give the company such an exclusive occupation of the special wires as to make them rateable to the relief of the poor in respect thereof, even in the parish where the special wires were the only wires affixed to the posts. Cie. Française du Télégraphie de Paris à New York *v.* Penzance Union - - - - 552

—— Appeal—Case stated—12 & 13 Vict. c. 45, s. 11 - - - - - - 1
See Practice.

PRACTICE—*Appeal—Case stated pursuant to Agreement and by Judge's Order—Poor Rate Appeal*—12 & 13 *Vict. c.* 45, *s.* 11—*Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 19.] An appeal will lie to the Court of Appeal from the decision of the Queen's Bench Division upon a case stated under 12 & 13 Vict. c. 45, s. 11, in an appeal against a poor-rate; for the decision of the Queen's Bench Division is an "order" within the meaning of the Supreme Court of Judicature Act, 1873, s. 19. Corporation of Peterborough *v.* Overseers of Wilsthorpe - - C. A. 1

2. —— *Attachment of Debts—Police Constable's Superannuation Allowance—Order XLV., r.* 1—"*Debt owing or accruing*"—*Wages Attachment Abolition Act*, 1870 (33 & 34 *Vict. c.* 30).] A sum already accrued due to a retired police constable in respect of his superannuation allowance under 11 & 12 Vict. c. 14, may be attached in execution.—*Semble*, the Wages Attachment Abolition Act, 1870, only applies to inferior Courts of record and not to the High Court of Justice. Booth *v.* Trail - - - - - 8

3. —— *Attachment of Debts—Garnishee Order absolute on Default of Appearance—Unliquidated Claim—Subsequent Award—"Debt" attachable—Judicature Act, Order XLV., r.* 1—*Assignment—Interpleader.*] A claim on a fire policy having

PRACTICE—*continued.*

been made against an insurance company for unliquidated damages, the plaintiff, a judgment creditor of the assured for 127*l.*, duly served an ex parte garnishee order, under Order XLV., rule 1, on the company, attaching all debts owing or accruing from them to the assured. The company did not appear to shew cause against it, and the order was made absolute. An award on the claim was afterwards made of 248*l.* due to the assured, who assigned it to trustees for his creditors. The plaintiff demanded payment under his garnishee order of 127*l.* out of the sum payable by the company, and threatened them with execution, and the trustees claiming the 248*l.*, the company took out an interpleader summons on which an order was made directing the sum of 127*l.* to be paid into Court, and an issue to be tried as to whether that sum was the property of the plaintiff or the trustees.—On appeal:—*Held*, that although no attachable debt was in existence at the date of the garnishee order, yet it, not having been set aside, entitled the plaintiff to issue execution for 127*l.*, and that the interpleader order was wrong. RANDALL *v.* LITHGOW - - - **525**

4. —— *Charging Orders—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24—*Order XLVI., r.* 1—*Jurisdiction—Debtor and Creditor—Company—Shares—Order for Sale of Shares subject to Charging Order.*] The plaintiff, having recovered judgment in an action, obtained an order absolute under Order XLVI., charging shares of the defendant in a company with the payment of the judgment debt and interest, and then applied to the Court for an order for sale of the shares:—*Held*, that s. 24 of the Judicature Act, 1873, did not give the Court jurisdiction to order the sale. LEGGOTT *v.* WESTERN - - - **287**

5. —— *Contempt of Court—Attachment—Solicitor—Order for Payment of Money—Punitive and disciplinary Process.*] A solicitor received on behalf of a client a sum of 339*l.*, which he paid into his account with his own bankers and dealt with as his own money. He afterwards forwarded to his client a sum of 100*l.*, and refused to pay the balance, on the ground that he had a claim against an agent whom his client had employed to communicate with him. Application having been made to the Queen's Bench Division to compel the solicitor to pay the money, the matter was referred to a master, who reported that the balance was due from the solicitor to his client. An order was made by the Queen's Bench Division, and also a subsequent order was made at chambers, that the solicitor should pay the balance claimed to his client. These orders not having been complied with, an order for the attachment of the solicitor was made by a judge at chambers:—*Held*, that the orders for the payment of the balance claimed were not merely in the nature of civil process, but were orders made against the solicitor as an officer of the Court, and that the attachment was properly granted.—*In re Ball* (Law Rep. 8 C. P. 104) explained.—*In re Freston* (11 Q. B. D. 545) followed. IN RE C. DUDLEY - - - - **C. A. 44**

6. —— *Bill of Costs—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*Assignee—Signature—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.] A solicitor assigned his bill of costs and the right to recover on it, and the assignee gave notice of the assignment and delivered the bill to the party to be charged inclosed in a letter signed by himself. After the expiration of a month he brought an action in his own name on the bill of costs:—*Held*, that the plaintiff was an assignee within s. 37 of the Solicitors' Act, 1843, and was entitled to maintain the action. INGLE *v.* M'CUTCHAN **518**

7. —— *Action remitted for Trial to County Court under* 19 & 20 *Vict. c.* 108, *s.* 26—*New Trial, Motion for—Order XXXIX., r.* 1—*Trial before Judge without Jury.*] In an action remitted for trial to a county court and tried by the county court judge without a jury, an application for a new trial must, under the Rules of the Supreme Court, 1883, be made to the Divisional Court. SWANSEA CO-OPERATIVE BUILDING SOCIETY *v.* DAVIES - - - - **21**

8. —— *County Court—Motion for New Trial—Improper Rejection of Evidence—Order XXXIX., r.* 6—*County Courts Act*, 1875 (38 & 39 *Vict. c.* 50), *s.* 6.] Order XXXIX., rule 6, provides that a new trial shall not be granted on the ground (inter alia) of the improper rejection of evidence, unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned in the trial:—*Held*, that the above rule applies to a motion in the High Court for a new trial in a county court action. SHAPCOTT *v.* CHAPPELL - - - - - **58**

9. —— *Interpleader—Rules of* 1883, *Order LIV., r.* 12 (6)—*Order LVII., rr.* 5, 9, 10, 15—*Order barring Claimant—Power of Master to award Costs—Costs of Defendant in Action as distinct from those in Interpleader Proceedings—Judicature Act*, 1873, *s.* 49.] Under the Rules of 1883, Order LIV., rule 12 (i), limiting the power of the master to award costs other than those of any proceeding before him or those specially authorized—the master in making an order barring the claimant upon an interpleader summons under Order LVII., when the applicant is a defendant, has no power under rule 15 to make it a term of the order that the plaintiff shall pay the costs of the defendant in the original action, apart from those in the interpleader proceedings, and an order to this effect is, notwithstanding 36 & 37 Vict. c. 66, s. 49, subject to appeal. HANSEN *v.* MADDOX - - - - **100**

10. —— *Interpleader—Service out of the Jurisdiction—Order LVII.*] Where the plaintiffs sued for goods in the possession of the defendant, and it appeared that a foreigner residing out of the jurisdiction claimed the right to the same goods and would probably sue the defendant in respect of them, the Court gave the defendant leave to serve an interpleader summons out of the jurisdiction upon the foreigner.—The effect of service out of the jurisdiction in such a case is to give the foreigner notice of the proceedings within the jurisdiction, so that he may appear and prosecute his claim, or, if he does not appear, so that any future claim prosecuted by him against the defendant in respect of the subject-matter of the action within the jurisdiction may be barred. CREDITS GERUNDEUSE *v.* VAN WEEDE - **171**

PRACTICE—*continued.*

11. —— *Interpleader—Trial by Jury—Application for New Trial—Court of Appeal.*] Under the Rules of 1883, Order LVII., rule 11, where an interpleader issue has been tried by a jury, and judgment given according to their finding by the presiding judge, application for a new trial must be made to the Court of Appeal and not to the Divisional Court. BURSTALL *v.* BRYANT 103

12. —— *Particulars — Defamation — Slander —Particulars of Persons to whom Slander was uttered.*] A statement of claim alleged that T., "at the request and by the direction of the defendant, falsely and maliciously spoke and published of and concerning the plaintiff" certain slanderous words, which were set out:—*Held*, that the defendant was entitled to particulars of the persons to whom the words were uttered. BRADBURY *v.* COOPER - - - - 94

13. —— *New Trial—Damages excessive — Power of Court to reduce Damages.*] In a case where the plaintiff is entitled to substantial damages, and a verdict for the plaintiff cannot be impeached except on the ground that the damages are excessive, the Court has power to refuse a new trial, on the plaintiff alone, and without the defendant, consenting to the damages being reduced to such an amount as the Court would consider not excessive had they been given by the jury. BELT *v.* LAWES - - - C. A. 356

14. —— *Action for Recovery of Land on Forfeiture—Judgment by Default—Power to set aside Judgment on Application of Equitable Mortgagees not Defendants—Order XXVII. r.* 15.] A judgment by default in an action against a lessee for recovery of land on forfeiture may be set aside under Order XXVII. rule 15, on the application of equitable mortgagees, although not parties to the action. JACQUES *v.* HARRISON - - 136

15. —— *Service of Writ of Summons out of the jurisdiction—Order XI., rules* 1 (*e*) *and* 2—*Action for breach of Contract—Defendant domiciled or ordinarily resident in Scotland or Ireland*]. There is no power to allow service of a writ out of the jurisdiction in actions for breach of contract under Order XI., rule 1 (e), where the defendant is domiciled or ordinarily resident in Scotland or Ireland. LENDERS *v.* ANDERSON - - 50

16. —— *Setting aside Judgment—Application by a Person not party to the Record—Judicature Act*, 1873, *s.* 24, *sub-s.* 5—*Order XXVII., rule* 15.] If a person, who is not a party to the record, seeks to set aside a judgment by which he is injuriously affected, which the defendant in the action has allowed to go by default, he ought by summons, taken out in the name of the defendant, or if not entitled to use the defendant's name, then taken out in his own name, but in that case served on both the plaintiff and the defendant, apply for leave to have the judgment set aside, and to be allowed either to defend the action on such terms of indemnifying the defendant as the judge may consider right, or to intervene in the action in the manner pointed out by the Judicature Act, 1873, s. 24, sub-s. 5. Order XXVII., rule 15, is designed to enable judgments by default to be set aside by those who have or who can acquire a locus standi, and does not give a locus standi to those who have none. JACQUES *v.* HARRISON [C. A. 165

17. —— *Stay of Proceedings — Executors, Actions by—Probate of Will.*] A testatrix having indorsed and delivered a bill of exchange to her bankers for collection at maturity, died before the bill became due, and her executors, before probate of the will was granted, sued the bankers for a return of the bill or its value.—The defendants were always willing to pay over the proceeds of the bill to the plaintiffs upon production of probate:—*Held*, that all proceedings in the action ought to be stayed until the plaintiffs obtained probate. *Webb v. Adkins* (14 C. B. 401; 23 L. J. (C. P.) 96) followed. TARN *v.* COMMERCIAL BANKING COMPANY OF SYDNEY - - 294

18. —— *Third Party—Appearance—Summons for Directions—Judgment on—Judicature Act*, 1873, *s.* 24, *sub-s.* 3—*Judicature Act*, 1875, *s.* 24—*Order XVI., r.* 52—*Married Women's Property Act*, 1882, 45 & 46 *Vict. c.* 75, *s.* 1.] Under Order XVI., rule 52, judgment against a third party who has appeared pursuant to a third party notice, but, at the hearing of an application by the defendant for directions, declines to state any defence, may be ordered, if the judge is not satisfied that there is any question proper to be tried as to the liability of the third party. The rule is consistent with the Judicature Act, 1873, s. 24, sub-s. 3, and the Judicature Act, 1875, s. 24, and is not ultrà vires. Such judgment under the rule may, since the Married Women's Property Act, 1882, be ordered against a married woman, third party, as a feme sole, declaring her separate estate chargeable even in respect of a liability created before that Act. GLOUCESTERSHIRE BANKING CO. *v.* PHILLIPPS - - - - - 533

19. —— *Third Party Procedure—Order XVI. rr.* 48, 52—*Contribution or Indemnity.*] The plaintiff sued the defendant for breach of a covenant to repair contained in a lease of a dwelling-house for a term of twenty-one years from Michaelmas, 1861. The defendant obtained leave to serve and served a third party notice claiming contribution or indemnity from a sub-lessee to whom he had let the premises from Midsummer, 1869, for the remainder of the original term less ten days. The underlease contained a covenant to repair, which was in terms precisely similar to those of the covenant in the original lease, and for breach of which the defendant claimed relief against the sub-lessee:—*Held*, that, inasmuch as the terms of the covenant to repair must in each case be construed with reference to the age and character of the premises at the time of the demise, the covenant in the underlease could not be construed as a covenant to indemnify the defendant against or to perform the covenant in the original lease; that the defendant's claim was not one for contribution or indemnity from the third party within Order XVI., rule 25, and that, therefore, no directions as to trial could be given under that rule. PONTIFEX *v.* FOORD - 152

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RAILWAY COMPANY—*Negligence—Level Crossing—Accident caused by Plaintiff's own Negligence.*] The defendants' railway crossed a public footway on the level. About half-past four o'clock in the afternoon of the 29th of March, the plaintiff, a foot-passenger, while crossing from the down side to the up side of the railway, was knocked down and injured at the crossing by a train of the defendants on the up line. Owing to the position of certain buildings which stood by the line it was impossible for any one crossing from the down side to see a train coming until he got within a step or two from the down line, but a person standing on the down line or the six-foot had a clear and uninterrupted view up and down the line for several hundred yards. The plaintiff, who lived near and was well acquainted with the crossing, stated that before crossing he looked to the right along the down line, but he admitted that he did not look to the left along the up line, and that if he had looked he must have seen the train coming. The engine-driver did not whistle. There was a servant of the defendants employed as a gatekeeper at the crossing, whose duty it was to open the carriage gates there when carriages could safely be admitted, and to close them at other times. He was standing at the time on the opposite side of the crossing talking to two boys, with a furled flag in his hand; but he gave no warning to the plaintiff that a train was coming. The plaintiff having brought an action against the defendants to recover compensation for his injuries, was nonsuited on the

RAILWAY COMPANY—*continued.*
above facts being proved at the trial:—*Held*, by Brett, M.R., and Bowen, L.J. (Baggallay, L.J., dissenting), that the nonsuit was right as, although there was evidence of negligence on the part of the defendants, yet according to the undisputed facts of the case the plaintiff had shewn that the accident was solely caused by his omission to use the care which any reasonable man would have used.—Decision of the Queen's Bench Division (11 Q. B. D. 213) affirmed. DAVEY *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY - - - - C. A. 70
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REVENUE—*Income Tax—Insurance Company—Different Branches of Insurance Business carried on by same Company to be taken together as one Business—Additions to Life Fund of Life Insurance Company out of Receipts of the Year—"Annual Profits or Gains"—Premiums not Profits—Sums paid as Bonuses to participating Policy-holders.*] An insurance company having one body of shareholders carried on three branches of business, viz., marine, fire, and life insurance business. The liabilities of the company were discharged partly out of premiums, partly out of income arising from large invested funds, which in the management of the business were allocated to the marine, fire and life branches respectively, and styled the marine, fire, and life funds; but the results of the business in all the branches were thrown together into one account called the "profit and loss account," and dividends were declared out of the balance of this account and not out of the profits of the particular branches:—*Held*, that for the purposes of income tax the three branches must be treated as one business and the profits calculated on the results of that business taken as a whole.—*Held*, also, that additions made to the life fund of the company out of receipts of the year were not subject to income tax as profits.—Life insurance premiums are not in the nature of annual profits, and therefore the "annual profits or gains" of life insurance for the purposes of income tax cannot be arrived at by taking the excess of premiums received during the year over the payments on policies falling due and business expenses during the same period. A life insurance company issued "participating policies" according to the terms of which any surplus, which existed at the

REVENUE—*continued.*
end of each quinquennial period in the hands of the company after payment of policies falling due during such period and provision for outstanding liabilities, was dealt with as follows: two-thirds of the surplus went to the policy holders, who received payment thereof either by way of bonus or abatement of premiums; the remaining third of the surplus went to the company, who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the only profit available for division among the shareholders:—*Held*, by Day, J., that the sums payable to the participating policy-holders as above-mentioned did not constitute profits or gains of the company assessable to income-tax.—*Held* otherwise, by A. L. Smith, J. LAST *v.* LONDON ASSURANCE CORPORATION - - - - - - - 389
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SHERIFF—*Seizure in Execution—Equity of Redemption—Duty of Sheriff—Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 13.] Where goods seized in execution by a sheriff under a fi. fa. have been previously assigned by the execution debtor to a third person as security for a debt, the sheriff is not bound to interplead and thereby enable proceedings to be taken for an order to sell being made by a judge under s. 13 of the Common Law Procedure Act, 1860, but is at liberty to withdraw, though the value of the goods seized exceed the sum secured by the bill of sale, and the execution debtor therefore has an equity of redemption which is valuable. SCARLETT *v.* HANSON - - - C. A. 213
—— Sale under execution—Application ex parte to sell by private contract - 162
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SHIP—*Bill of Lading, Exceptions in, applicable to Matters occurring during the Voyage—Breach of Obligation to provide reasonably fit Ship—Clause limiting Liability of Shipowners, Scope of.*] The plaintiff shipped certain cattle on board the defendants' ship for carriage from London to New York under a bill of lading which provided as follows:—"These animals being in sole charge of shipper's servants, it is hereby expressly agreed that the shipowners, or their agents or servants, are, as respects these animals, in no way responsible either for their escape from the steamer or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than 5*l.* for each of the animals." The ship had on her previous voyage carried cattle suffering from foot and mouth disease. Some of the cattle shipped under the bill of lading were during the voyage infected with that disease, owing to the negligence of the defendants' servants in not cleansing and disinfecting the ship before receiving the plaintiff's cattle on board and signing the bill of lading, and the plaintiff in consequence suffered damage amounting to more than 5*l.* for each of the said cattle:—*Held*, that the provision in the bill of lading limiting liability to 5*l.* for each of the cattle did not apply to damage occasioned by the defendants not providing a ship reasonably fit for the purposes of the carriage of the cattle which they had contracted to carry. TATTERSALL *v.* NATIONAL STEAMSHIP COMPANY - - - - 297
2. —— *Charterparty — Demurrage — Completion of Voyage—Charterer's Option to order Ship to one of several Places in Dock—Discharge of Cargo.*] By the terms of a charterparty the ship was to load from the charterer's agents at Cardiff a cargo of coals, "and therewith proceed to Dieppe and deliver the same alongside consignee's or railway wharf, or into lighters, or any vessel or wharf where she may safely deliver, as ordered, cargo to be loaded and discharged in forty-eight running hours, &c. Demurrage over and above the said lying time at 10*s.* per hour." The ship arrived in the dock at Dieppe, and was ordered to discharge at the railway wharf, but in consequence of all the discharging berths being occupied, she was not berthed at the railway wharf

SHIP—*continued.*
until twenty-four hours after her arrival in the dock. In an action by shipowner against charterers for demurrage:—*Held*, that the voyage was not completed, and the lying time did not commence under the charterparty until the ship was berthed at the railway wharf, and therefore that the defendants were not liable to pay demurrage for delay in respect of the period which elapsed between the ship's arrival in the dock at Dieppe and her being berthed at the railway wharf.—*Davies* v. *McVeagh* (4 Ex. D. 265) considered. MURPHY *v.* COFFIN - - - - **87**

3. —— *General Average—Charterparty—Deck Cargo jettisoned—"At Merchant's risk."*] It was stipulated in a charterparty that the "ship should be provided with a deck cargo if required at full freight, but at merchant's risk":—*Held*, reversing the decision of the Queen's Bench Division, that the words "at merchant's risk" did not exclude the right of the charterers to general average contribution from the shipowners in respect of deck cargo, shipped by the charterers, and necessarily jettisoned to save the ship and the rest of the cargo. BURTON *v.* ENGLISH - **C. A. 218**

—— City of London Court—Admiralty jurisdiction—Goods carried on ship - **115**
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SOLICITOR—*Defendant in Person—Costs as Solicitor—Taxation.*] Where an action is brought against a solicitor who defends it in person and obtains judgment he is entitled upon taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary. LONDON SCOTTISH BENEFIT SOCIETY *v.* CHORLEY - **452**

2. —— *Delivery of Documents—Summary Jurisdiction.*] The Court will not summarily order a solicitor to deliver up a deed to his client unless it be clearly shewn not only that his solicitor has no lien upon it, but that he is holding it for the applicant alone, and as his solicitor. Ex PARTE COBELDICK - - - - **C. A. 149**

3. —— *Summary Jurisdiction over—Appeal from Order striking off the Rolls—Judicature Act, 1873, s.* 47.] When the High Court makes an order ordering a solicitor to be struck off the rolls for misconduct, it does so in exercise of a disciplinary jurisdiction over its own officers, and not of a jurisdiction in any criminal cause or matter within the meaning of s. 47 of the Judicature Act, 1873, and therefore an appeal lies from such order to the Court of Appeal. IN RE E. F. HARDWICK [**C. A. 148**

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TENANCY IN COMMON—*House—Ordinary Repairs—Contribution.*] One tenant in common of a house who expends money on ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution. LEIGH *v.* DICKESON - - - - - - 194

THEATRE—*Having or keeping a House for the Public Performance of Stage Plays*—6 & 7 *Vict. c.* 68, *s.* 2.] The appellant was the owner and occupier of a building which he gratuitously allowed to be used on a few occasions for the performance of stage plays, to which the public were admitted on payment, for the benefit of a charity. The appellant had no licence for the performance of stage plays in such building:—*Held*, that he was rightly convicted, of having or keeping a house for the public performance of stage plays without a licence, under 6 & 7 Vict. c. 68, s. 2. SHELLEY *v.* BETHELL - - - 11

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TRAMWAY—*Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 29, 55—*Liability for Non-repair of Road—Contract with Road Authority—Transfer of Liability.*] Where a tramway company enters into a contract with the road authority under 33 & 34 Vict. c. 78, s. 29, whereby the road authority undertakes the repair of the portion of the road upon which the tramway is laid, the liability for damage occasioned by the non-repair of that part of the road, which would but for such contract be cast by s. 28 upon the tramway company, is transferred to the road authority. HOWITT *v.* NOTTINGHAM AND DISTRICT TRAMWAYS CO. 16

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VENDOR AND PURCHASER—*Misdescription in Particulars of Sale—Effect of Acceptance of a Conveyance.*] The acceptance of a conveyance of property does not debar the vendee's right to sue for compensation in respect of a breach of contract contained in the particulars and conditions of sale whereby the value of the land is diminished.—In March, 1882, the defendant put up for sale by auction certain freehold property described in the particulars of sale as producing a net annual rental of 39*l.* On the faith of such particulars the plaintiff became the purchaser for 650*l.* By one of the conditions of sale it was provided as follows:—"The property is believed and shall be taken to be correctly described: but if any error, misstatement, or omission in the particular be discovered, the same shall not annul the sale, but compensation shall be allowed by the vendor or purchaser, as the case may require."—At the trial the jury found that the statement as to the amount of the net rental was inaccurate, and that the value of the property was thereby depreciated to the extent of 50*l.*—In August, 1882, a conveyance in fee of the property (without any covenants) was executed by the defendant to the plaintiff; and the latter entered into possession. In January, 1883, the plaintiff discovered that the rental of 39*l.* was a gross rental, the net rental being considerably less:—*Held*, by A. L. Smith, J.,—upon the authority of *Bos* v. *Helsham* (Law Rep. 2 Ex. 72) and *In re Turner and Skelton* (13 Ch. D. 130),—that, notwithstanding his having accepted the conveyance, the purchaser was entitled to maintain an action for breach of contract.—*Joliffe* v. *Baker* (11 Q. B. D. 255) distinguished. PALMER *v.* JOHNSON - - - - - - 32

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